Supreme Court, U.S.
FILED

(1)

98 425 SEP 9 - 1998

No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

DAVID LAWRENCE SOLOMON,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA.

PETITION FOR A WRIT OF CERTIORARI.

DAVID SOLOMON
880 Mandalay Avenue
Suite N-911
Clearwater, Florida 33767-1229
(727) 442-8600

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

75 pp

QUESTIONS PRESENTED.

Petitioner is an attorney who has represented clients *pro bono* who were declared indigent by the courts and could not find any other lawyer to represent them. The Florida Supreme Court upheld two of the five findings of guilt based on petitioner's difficulty in locating two indigent clients when they were needed to execute affidavits. One of these indigent clients was a *pro bono* client who was needed to execute her insolvency affidavit. The Florida Supreme Court ordered an indefinite suspension based on five alleged pleading errors that are not pleading errors, *as a matter of law*. The five alleged *pleading errors* are the five "specific instances of misconduct" on which the *five findings of guilt* are based in the decision below.

The Florida Supreme Court upheld *three* findings of guilt that were based on "specific instances of misconduct" that were *never* charged in writing in the Bar's complaint, but were allegedly "within the scope of the Bar's accusations".

The Florida Supreme Court upheld these *three* findings of guilt over the objection that the United States Supreme Court in *In re Ruffalo* required that *every* finding of guilt must be based on a charge in writing in the Bar's complaint which stated the "precise nature of the charges". A finding of guilt that did not satisfy these requirements violated the notice required by constitutional due process. *Only one* such infirm finding of guilt was required to reverse the suspension in *In re Ruffalo*. Therefore, the Florida Supreme Court's decision below is in direct conflict with the United States Supreme Court's decision in *In re Ruffalo*.

The first question presented is this:

1. Do *three* of the findings of guilt upheld by the Florida Supreme Court violate the notice required by constitutional due process because they were not based on charges in writing in the Bar's complaint which stated the "precise nature of the charges"?

The Florida Supreme Court also requires that in the prosecution of all professions with the exception of the legal profession, that every finding of guilt must be based on a charge in writing in the prosecutor's complaint which stated the precise nature of the charges.

The second question presented is this:

2. Does Florida law violate equal protection by requiring that in the prosecution of all professions with the exception of the legal profession

that every finding of guilt must be based on a charge in writing in the prosecutor's complaint which stated the precise nature of the charges?

LIST OF PARTIES.

The petitioner and the respondent are named in the caption.

TABLE OF CONTENTS.

Questions presented i

List of parties iii

Table of authorities vii

Opinions below 1

Jurisdiction 1

Constitutional provisions involved 1

Statement of the case 2

I. Findings of guilt that were *never* charged in writing in the Bar's complaint are a deprivation of due process 2

II. The decision below resulted from a political prosecution which was ostensibly an attorney disciplinary prosecution. The prosecution was wholly devoid of any competent and substantial legal support 3

III. The referee found petitioner *not guilty* of two hundred sixteen of the two hundred seventeen paragraphs which were charged in writing in the Bar's complaint 5

IV. *Breen* v. *Huntley-Jiffy Stores, Inc.*: This finding of guilt is a deprivation of due process because petitioner had no notice that the appeal of a non-final order could "delay" the proceedings in the lower tribunal. This is because the applicable court Rule 9.130(F) states that the appeal of a non-final order cannot "delay"

the proceedings in the lower tribunal, *as a matter of law* 6

V. *Keene* v. *Nudera*:
This finding of guilt is a deprivation of due process because petitioner had no notice that the form of Ms. Keene's affidavit could be found to be "insufficient". This is because the form of Ms. Keene's affidavit strictly conformed to the form of affidavit in court Rule 3.989. The forms in court rules are authorized and approved by the Florida Supreme Court to be "forms" sufficient for the matters covered by them, *as a matter of law* 8

VI(a). *Fernandes* v. *Boisvert*:
This finding of guilt is a deprivation of due process because petitioner had no notice that Ms. Fernandes' original complaint which contained the allegation of "medical care" in paragraph eight could be found to be a complaint which lacked *any* allegation of "medical care". This is because the allegation of "medical care" in paragraph eight of Ms. Fernandes' original complaint strictly conformed to the allegation of "medical care" in court forms 1.945 and 1.946. The forms in court rules are authorized and approved by the Florida Supreme Court to be "forms sufficient for the matter covered by them", *as a matter of law* 11

VI(b). This finding of guilt is a deprivation of due process because petitioner had no notice that there exists any case law that can support the disposition of a venue challenge that results in a dismissal rather than a transfer. This is because no case law exists in Florida

that has ever found it *not* to be reversible error to dispose of a venue challenge with a dismissal rather than a transfer, *as a matter of law* 17

VI(c). This finding is a deprivation of due process because petitioner had no notice that the "confusion" and erroneous understanding of the law by the *trial judge* which was reversed on appeal is "confusion" and error which is attributable to the *attorney*/petitioner. This is especially true because petitioner advised the trial judge of the correct law which the trial judge chose not to follow concerning the cured affidavit on rehearing 19

Reasons for granting certiorari 22

I. Findings of guilt that were *never* charged in writing in the Bar's complaint are a deprivation of due process 22

II. Florida law also violates equal protection because specific charges in writing in the complaint are required in Florida for all professions except the legal profession 28

III. The decision below requires reversal because the Bar's misconduct significantly tainted the findings of guilt based on Judge Patterson's testimony 28

IV. Discipline to be imposed 29

Conclusion 30

TABLE OF AUTHORITIES.

CASES:

Abdul Ghani, M.D. v. Dept. of Health, 23 Fla.L.Weekly D1677 (Fla. 1st DCA 1998) 28

Charlonne v. Rosenthal, 642 So.2d 632 (Fla. 3rd DCA 1994) 21

Florida Bar v. Nowacki, 697 So.2d 828 (Fla. 1997) 26, 27, 28

Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981) 26, 27, 28

Holl v. Talcott, 191 So.2d 40 (Fla. 1966) 21

In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 23

In re Ruffalo, 390 U.S. 544 (1968), 88 S.Ct. 1222, 20 L.Ed.2d 117 ..... i, 22, 23, 25

King v. Pearlstein, 592 So.2d 1176 (Fla. 2nd DCA 1992) 18

Tropicana Products, Inc. v. Shirley, 501 So.2d 1373 (Fla. 2nd DCA 1987) 18

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.

United States Constitution
Fourteenth Amendment, § 1 1

United States Code
28 U.S.C. § 1257(a) 1

Florida Rules of Appellate Procedure
Rule 9.130(f) 6, 7

Florida Rules of Civil Procedure
Rule 1.120(g) 14, 16
Rule 1.900(b) 8, 10, 13
Rule 1.945 ..... 11, 12, 13
Rule 1.946 ..... 11, 12, 13
Rule 1.951 13

Florida Rules of Criminal Procedure
Rule 3.989 ..... 8, 9

OPINIONS BELOW.

The opinion of the Supreme Court of Florida is reported at 23 Fla.L.Weekly S115 (Fla. 1998), and is reprinted along with the order of that court as Appendix A at page 1a. The referee's findings of guilt and supporting findings of fact are unreported and are reprinted as Appendix B at page 13a. The order of the Supreme Court of Florida denying petitioner's timely petition for rehearing is unreported and is reprinted as Appendix C at page 24a. The trial transcript in which the referee sustained objections to evidence which was "irrelevant" to any of the charges in writing in the Bar's complaint of unethical conduct is unreported, and is reprinted as Appendix G at page 32a. The referee and the Supreme Court of Florida subsequently upheld guilt on this uncharged alleged unethical conduct.

JURISDICTION.

The judgment of the Supreme Court of Florida was entered on February 26, 1998. A timely petition for rehearing was denied on June 11, 1998. See Appendix C at page 24a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED.

Section One of the Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE.

I. FINDINGS OF GUILT THAT WERE NEVER CHARGED IN WRITING IN THE BAR'S COMPLAINT ARE A DEPRIVATION OF DUE PROCESS.

This is an attorney discipline case. Petitioner was deprived of due process because he had *never* been given any notice in writing in the Bar's complaint or otherwise that he was to be tried for *three* of the five findings of guilt found in the decision below. *Three* of the five findings of guilt in the decision below were *never* charged in writing in the Bar's complaint. The decision below also strikes one of the referee's findings of guilt because the Bar agreed that it was based on evidence which was stricken from the record. This evidence was stricken from the record because it was "irrelevant" to any unethical conduct that was charged in writing in the Bar's complaint. However, one of the five findings of guilt in the decision below was upheld even though it was based on evidence that was not allowed into the record. The evidence which "supported" this finding of guilt was not allowed into the record because it was also "irrelevant" to any unethical conduct which was charged in writing in the Bar's complaint (A. 32a).

All five *findings of guilt* in the decision below are five alleged *pleading errors* made by petitioner in three unrelated client cases. However, petitioner will show that all of the five findings of guilt which are allegedly pleading errors are not pleading errors, *as a matter of law*. All of the five findings of guilt are based on pleadings which *strictly conformed* to the specifically applicable court forms, court rules and case law which are authorized and approved by the Florida Supreme Court to be "sufficient for these matters", *as a matter of law*. Petitioner was further deprived of due process because he had never been given any notice that it is unethical conduct to *strictly conform* to the specifically applicable court forms, court rules, and case law which are authorized and approved by the Florida Supreme Court to be "sufficient for these matters", *as a matter of law*.

II. THE DECISION BELOW RESULTED FROM A POLITICAL PROSECUTION WHICH WAS OSTENSIBLY AN ATTORNEY DISCIPLINARY PROSECUTION. THE PROSECUTION WAS WHOLLY DEVOID OF ANY COMPETENT AND SUBSTANTIAL LEGAL SUPPORT.

The decision below made five findings of guilt. All of the five findings of guilt were based on five alleged pleading errors in the cases of the clients Mrs. Breen, Ms. Keene and Ms. Fernandes. No clients ever complained to the Bar. All clients who testified strongly supported petitioner. It was the Bar that initiated the lengthy politically motivated investigation and prosecution that was unlimited in its scope and reach. There was not even one allegation of any loss to any client. There were findings of guilt for "delay" to the cases of Mrs. Breen and Ms. Fernandes. There were also findings of guilt for two possible losses to Ms. Fernandes that never occurred. The finding of guilt in Ms. Keene's case did not even allege a possible loss to Ms. Keene.

Mrs. Breen was stabbed while using a pay telephone. Ms. Keene was an indigent assisted *pro bono*. Ms. Keene sought appellate review of the trial court's discovery order to disclose in camera extensive confidential medical records concerning her childhood sexual abuse that occurred more than two decades earlier. Ms. Keene objected that these remote, unrelated, confidential events were beyond the reasonable discovery needed by the insurer to adequately defend against her claim for minor neck and back injuries sustained in an automobile collision that occurred more than two decades after her childhood sexual abuse. Ms. Fernandes was an indigent seminary student severely beaten by a recent acquaintance whom she did not know was a felon. Ms. Fernandes was unable to find any other attorney to assist her until she telephoned petitioner three hours before the expiration of the statute of limitations.

All of the five findings of guilt are five alleged pleading errors in these three client cases. All five findings of guilt are wholly devoid of any competent and substantial legal support. This is because all of the five findings of guilt are five alleged pleading errors that arise from pleadings that *strictly conformed* to the specifically applicable court forms, court rules and case law which are authorized and approved by the Florida Supreme Court to be "sufficient for these matter", *as a matter of law*.

The decision below resulted from a political prosecution that was ostensibly an attorney disciplinary prosecution. Attorney disciplinary prosecutions against attorneys, judges who are attorneys, legislators who are attorneys, and other public officials who are attorneys, intentionally compromises the notice safeguards of due process. The notice safeguards of due process are intentionally compromised in attorney disciplinary prosecutions with the laudable goal to require higher ethical standards in the disciplinary prosecutions of attorneys and public officials who are attorneys than in any other kind of prosecution. An undesirable result of the intentional compromise of the notice of safeguards of due process is an investigation and prosecution that is potentially endless in its duration and unlimited in its scope and its reach. The compromise of the notice safeguards of due process in an ostensible disciplinary prosecution of an attorney which is a politically motivated prosecution will unfairly shatter the career of the attorney. The inequitable results of political prosecutions erodes the confidence of the public in our entire legal system.

The facts of this case offers this Court a good vehicle for a decision in which to define the notice that is required in disciplinary prosecutions against attorneys, judges who are attorneys, legislators who are attorneys, and other public officials who are attorneys. A decision by this Court which defines the notice that is required in disciplinary prosecutions against attorneys will place much needed restraints on the presently unlimited duration, scope and reach of politically motivated investigations and prosecutions against judges, lawyers, and other public officials who are lawyers, which ostensibly are disciplinary prosecutions. A decision by this Court specifically directed to disciplinary prosecutions in the legal profession to require that all charges must be in writing in the prosecutor's complaint at the commencement of the proceedings will fairly limit and define the presently unlimited duration, scope and reach of politically motivated investigations and prosecutions against lawyers, judges who are lawyers, legislators who are lawyers, and other public officials who are lawyers which are ostensibly disciplinary prosecutions.

III. THE REFEREE FOUND PETITIONER *NOT GUILTY* OF TWO HUNDRED SIXTEEN OF THE TWO HUNDRED SEVENTEEN PARAGRAPHS WHICH WERE CHARGED IN WRITING IN THE BAR'S COMPLAINT.

The referee found petitioner *not guilty* of two hundred sixteen of the two hundred seventeen paragraphs which were charged in writing in the Bar's complaint. Therefore, the referee found petitioner guilty of *only one* of the two hundred seventeen paragraphs which were charged in writing in the Bar's complaint. The seven page decision below (twelve pages in this appendix) devotes the first four pages to a detailed description of the many charges for which petitioner was found *not guilty* by both the Florida Supreme Court and the referee. Without a careful reading of one sentence in the decision below, it appears petitioner was found guilty of all of the charges described in detail in the first four pages. The one sentence is as follows (A. 6a):

> The referee recommended that Solomon be found *not guilty* of violating rules 4-1.1 and 4-1.3 with respect and counts I, II, IV, V, and VI . . . [emphasis supplied]

The decision reveals that petitioner was also found *not guilty* of one of the findings of guilt made by the referee based on evidence which was stricken from the record because it was "irrelevant" to any unethical conduct that was charged in writing in the Bar's complaint (A. 7a).

> As to case no. 87,667, Solomon contends that the referee's findings and conclusions cannot stand because they are based on evidence stricken from the record. The Bar agrees that the referee struck all evidence relating to the sexual assault and child abuse references in the titles of Solomon's motions.

The format of the remainder of the Statement of the Case sets forth a brief description of each of the five alleged pleading errors that resulted in the five findings of guilt, the referee's findings of guilt on each of these five alleged pleading errors, the relevant court forms, court rules and case law which shows that each of the five alleged pleading errors

strictly conformed to the specifically applicable court forms, court rules, and case law that are authorized and approved by the Florida Supreme Court to be "sufficient for these matters", *as a matter of law*, and then the relevant portions of the decision below which overlooked the specifically applicable court forms, court rules, and case law to thereby erroneously uphold the five findings of guilt.

IV. *BREEN* V. *HUNTLEY-JIFFY STORES, INC.*: THIS FINDING OF GUILT IS A DEPRIVATION OF DUE PROCESS BECAUSE PETITIONER HAD NO NOTICE THAT THE APPEAL OF A NON-FINAL ORDER COULD "DELAY" THE PROCEEDINGS IN THE LOWER TRIBUNAL. THIS IS BECAUSE THE APPLICABLE COURT RULE 9.130(F) STATES THAT THE APPEAL OF A NON-FINAL ORDER CANNOT "DELAY" THE PROCEEDINGS IN THE LOWER TRIBUNAL, AS A MATTER OF LAW.

In Mrs. Breen's case, petitioner's alleged pleading error was that he caused "delay" described as "protracted litigation" by the appeal of a non-final order. This appeal of this non-final order remained pending for only thirty-nine days. This finding of unethical conduct was upheld over the objection that Florida Rules of Appellate Procedure, Rule 9.130(f) which authorizes the appeal of a non-final order states, *as a matter of law*, that the appeal of a non-final order in the absence of a stay will not "delay" the case as will the appeal of a final order.

In Mrs. Breen's case, the referee found the petitioner's alleged pleading error to be that he caused "delay" described as "protracted litigation" by the appeal of a non-final order. The appeal of this non-final order remained pending for only thirty nine days. The referee's relevant findings are as follows (A. 14a):

> In as much as the Second DCA saw fit to grant Respondent's numerous motions for additional time to prosecute the first notice of appeal, and ultimately adopted Respondent's position by overturning the ruling of the trial court, there does not appear to be sufficient evidence of incompetence or lack of diligence by Respondent with respect to the first notice of appeal.

> The remaining issue is to the manner in which Respondent dealt with the filing of the second notice of appeal. It appears clear that following the trial court's second order transferring venue to Duval County on April 7, 1993, and in as much as the incident giving rise to the lawsuit occurred on March 21, 1987, the interest of the client would best be served by adopting one of two possible courses of action. One, undertaking to conclude the case in Duval County on a timely basis or two, if in good faith. Respondent believed that a second appeal was in the best interest of his client, not only to file the second notice of appeal on a timely basis but to vigorously pursue it.
>
> Respondent chose to file the second notice of appeal thus *delaying* the timely completion of litigation in Duval County and by failing to timely file the second notice of appeal brief or notice of appeal and suffered the dismissal of the second notice of appeal on August 16, 1994.
>
> For these reasons, the referee finds that the interest of Respondent's client was clearly damaged by the *protracted litigation* and constitutes sufficient grounds for finding that Respondent has violated Rule 4-1.3 diligence. [emphasis supplied].

Florida Rules of Appellate Procedure, Rule 9.130(f) states that the appeal of a non-final order will not "delay" the proceedings of the case in the lower tribunal in the absence of a stay.

> (f) *Stay of Proceedings*. In the absence of a stay, during the pendency of a review of a non-final order, *the lower tribunal may proceed with all matters*, including trial or final hearing; provided that the lower tribunal may not render a final order disposing of the cause pending such review. [emphasis supplied].

Petitioner's defense was that the applicable court rule states, *as a matter of law*, that the appeal of a non-final order will not "delay" the proceedings in the lower tribunal while the appeal of a non-final order remains pending. The decision below states that petitioner's defense is

without merit. The decision below and a portion of footnote four states as follows (A. 7a):

> After reviewing the record, we conclude that five of these issues are without merit and do not warrant discussion.
> 4 . . . Fifth, as to case No. 86,914, Solomon asserts that filing an interlocutory appeal does not delay litigation.

V. *KEENE* V. *NUDERA*:

THIS FINDING OF GUILT IS A DEPRIVATION OF DUE PROCESS BECAUSE PETITIONER HAD NO NOTICE THAT THE FORM OF MS. KEENE'S AFFIDAVIT COULD BE FOUND TO BE "INSUFFICIENT". THIS IS BECAUSE THE FORM OF MS. KEENE'S AFFIDAVIT STRICTLY CONFORMED TO THE FORM OF AFFIDAVIT IN COURT RULE 3.989. THE FORMS IN COURT RULES ARE AUTHORIZED AND APPROVED BY THE FLORIDA SUPREME COURT TO BE "FORMS SUFFICIENT FOR THE MATTERS COVERED BY THEM", AS A MATTER OF LAW.

In Ms. Keene's *pro bono* indigency case, petitioner's alleged pleading error was that he drafted her insolvency affidavit using a form of affidavit that was "insufficient", "unconventional", and "ultimately failed". This finding of unethical conduct was upheld over the objection that Ms. Keene's form of affidavit strictly conformed to the court form of affidavit in Florida Rules of Criminal Procedure, Rule 3.989. Florida Rules of Civil Procedure, Rule 1.900(b) states that the court "forms are sufficient" that are included in the court rules. Court forms in court rules are therefore authorized and approved by the Florida Supreme Court to be "sufficient" forms, *as a matter of law*. This finding of unethical conduct was upheld over the additional objection that Ms. Keene's insolvency affidavit did *not* ultimately fail. Ms. Keene's insolvency affidavit did *not* ultimately fail because although it was not initially accepted by the district court, it *was* ultimately accepted by the Florida Supreme Court to waive their two hundred fifty dollar filing fee which otherwise would have been required to review the decision of the district court.

In Ms. Keene's case, the referee found petitioner to be *not guilty* of unethical conduct concerning the sufficiency of the *form of her affidavit*.

The decision below found petitioner to be guilty of unethical conduct concerning the sufficiency of the form of her affidavit.

The formal oath and language of an affidavit that is authorized to be a sufficient form of an affidavit in Rule 3.989 is substantially similar to the formal oath and language which is found in Ms. Keene's insolvency affidavit. The formal oath authorized and approved by the Florida Supreme Court in Rule 3.989 to be a sufficient form for an affidavit, *as a matter of law*, is as follows:

_____
Defendant/Petitioner

Sworn to and subscribed before me this ___ day of _____, 19 ___.

_____
Notary Public

The formal oath and language which is found in Ms. Keene's insolvency affidavit is substantially similar to the formal oath and language found in the form of affidavit authorized and approved by the Florida Supreme Court in Rule 3.989. The formal oath in Ms. Keene's insolvency affidavit is as follows:

Sworn and subscribed before me this ___ day of _____, 19 ___.

_____
Marjorie Keene

My Commission Expires:

_____
Notary Public

The form of affidavit in Rule 3.989 is a form of affidavit authorized and approved to be a "sufficient" form of affidavit by the Florida Supreme Court, *as a matter of law*. This is because Florida Rules of Civil Procedure, Rule 1.900(b) states that the court forms included in the court rules are forms that are "sufficient", *as a matter of law*.

RULE 1.900 FORMS

> (b) *Other Forms*. The other *forms are sufficient* for the matters covered by them. So long as the substance is expressed without prolixity, the forms may be varied to meet the facts of a particular case. [emphasis supplied]

The decision below states that the district court found that Ms. Keene's insolvency affidavit was insufficient because it contained no formal oath and was not in the standard language of an affidavit. The decision below states as follows (A. 5a):

> The district court ultimately dismissed the petition for certiorari, finding the "affidavit" of insolvency to be *insufficient*. Evidently, the document contained *no formal oath and was not in the standard language of an affidavit*. Undeterred, Solomon petitioned this Court to review the decision of the district court. This Court denied the petition and also denied Solomon's motion for reinstatement of the petition. [emphasis supplied]

The decision below states that Ms. Keene's insolvency affidavit was unconventional and ultimately failed. The decision below states as follows (A. 8a):

> Solomon's attempt to prove his client's indigency was *unconventional* and *ultimately failed*. The interests of his client were clearly harmed by his incompetence. We conclude that the record contains competent and substantial evidence supporting the referee's recommendation that Solomon be found guilty of violating rule 4-1.1 in case No. 87,667. [emphasis supplied]

The above citation stated that the referee recommended petitioner be found guilty of violating rule 4-1.1 in case No. 87,667. This is true. However, the decision below does *not* make it clear that in case no. 87,667, Ms. Keene's case, that the referee found petitioner *not guilty*

concerning the *form of Ms. Keene's affidavit*. The decision below does *not* make it clear that in case No. 87,667, Ms. Keene's case, that the referee found petitioner guilty of the totally different matter concerning the use of the "explicit language" of the formal title of a statute in the title of his motion. "Sexual Assault Counselor-Victim Privilege" is the formal title of the statute. The referee found it unethical conduct to use this "explicit language" of the formal title of this statute in the title of his motion. The decision below does *not* make it clear that the referee's finding of guilt in case No. 87,667, Ms. Keene's case, concerning the title of his motion was *not* upheld because all of the evidence concerning to the title of that motion was stricken from the record because it was "irrelevant" to any unethical conduct that was charged in writing in the Bar's complaint.

VI(a). *FERNANDES* V. *BOISVERT*:
THIS FINDING OF GUILT IS A DEPRIVATION OF DUE PROCESS BECAUSE PETITIONER HAD NO NOTICE THAT MS. FERNANDES' ORIGINAL COMPLAINT WHICH CONTAINED THE ALLEGATION OF "MEDICAL CARE" IN PARAGRAPH EIGHT COULD BE FOUND TO BE A COMPLAINT WHICH LACKED ANY ALLEGATION OF "MEDICAL CARE". THIS IS BECAUSE THE ALLEGATION OF "MEDICAL CARE" IN PARAGRAPH EIGHT OF MS. FERNANDES' ORIGINAL COMPLAINT STRICTLY CONFORMED TO THE ALLEGATION OF "MEDICAL CARE" IN COURT FORMS 1.945 AND 1.946. THE FORMS IN COURT RULES ARE AUTHORIZED AND APPROVED BY THE FLORIDA SUPREME COURT TO BE "FORMS SUFFICIENT FOR THE MATTERS COVERED BY THEM", AS A MATTER OF LAW.

This finding of guilt is the *only* finding of guilt made by the referee which was based on a "specific instance of misconduct" which was in writing in the Bar's complaint. In Ms. Fernandes' indigency case, petitioner's first alleged pleading error was that his drafting of her original complaint lacked *any* allegation that the defendants were responsible for "medical care" caused by their negligence. This finding of guilt was upheld over the objection that paragraph eight of Ms. Fernandes' original complaint alleged "medical care" in a form which strictly conformed to

two court forms authorized and approved by the Florida Supreme Court to be a "sufficient" allegation of "medical care", *as a matter of law.*

In Ms. Fernandes' case, the referee's *finding of fact* concluded that Ms. Fernandes' original complaint *did* allege that the defendants were responsible for "medical bills" caused by their negligence (A. 18a). However, the referee's findings of guilt based on his findings of fact made the non-sequitur conclusion that Ms. Fernandes' original complaint *did not* allege that the defendants were responsible for "medical bills" caused by their negligence. The referee's relevant finding of fact is as follows (A. 18a):

> For these reasons, the property owners were charged with negligence and *alleged to be responsible for medical bills* at Tampa-General Hospital and permanent injuries. [emphasis supplied]

The referee's relevant finding of guilt is as follows (A. 21a):

> In view of the specific footnote one, added to the Second DCA's opinion authored by Judge Patterson, clearly suggesting the need for an amended complaint containing *an allegation of special damages, the failure to seek an amendment to the initial complaint special damages* [sic] reflects a lack of requisite skill required under Rule 4-1.1 dealing with legal competency. [emphasis supplied]

Florida Rules of Civil Procedure, court Forms 1.945 and 1.946 allege defendants to be responsible for medical care as follows:

> FORM 1.945 MOTOR VEHICLE NEGLIGENCE . . .
> 4. As a result plaintiff suffered bodily injury and resulting pain and suffering, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, *medical and nursing care and treatment*, loss of earnings, loss of ability to earn money, and aggravation of a previously existing condition. *The losses are either permanent* or continuing and plaintiff will suffer the losses in the future. Plaintiff's automo-

> bile was damaged and he/she lost the use of it during the period required for its repair or replacement. [emphasis supplied]

Court Form 1.946 is entitled, MOTOR VEHICLE NEGLIGENCE WHEN PLAINTIFF IS UNABLE TO DETERMINE WHO IS RESPONSIBLE. Court Form 1.946 alleges defendants to be responsible for "medical care" using the same words as court Form 1.945. There is variation in court forms in pleading identical matters. Court Form 1.951 alleges "medical care" using the words "medical expense".

> FORM 1.951 FALL-DOWN NEGLIGENCE COMPLAINT . . .
> 6. As a result plaintiff was injured in and about his/her body and extremities, suffered pain therefrom, incurred *medical expense* in the treatment of the injuries, and suffered physical handicap, and his/her working ability was impaired; *the injuries are either permanent* or continuing in nature and plaintiff will suffer the losses and impairment in the future. [emphasis supplied]

The use of the words "medical care" in Forms 1.945 and 1.946 is an allegation of "medical care" authorized and approved to be a "sufficient" allegation of medical care by the Florida Supreme Court, *as a matter of law*. This is because Rule 1.900(b) states that the court forms included in the court rules are forms which are "sufficient for the matters covered by them", *as a matter of law*.

Paragraph eight of Ms. Fernandes' original complaint alleged "medical care" using the words "medical care". Court Forms 1.945 and 1.946 allege "medical care" using the words "medical care". Rule 1.900(b) states court "forms are sufficient for the matters covered by them", *as a matter of law*. Therefore, the use of the words "medical care" are "sufficient", *as a matter of law*. Paragraph eight of Ms. Fernandes' original complaint is as follows:

> 8. Due to this negligence of the Defendants in failing to warn of the dangerous condition, inviting Plaintiff onto the property where there was a dangerous condition, and failing to stop the dangerous condition or taking any action to stop the dangerous

> condition, Elisa has *suffered permanent injuries*, for which she received extensive *medical care* at Tampa General Hospital. [emphasis supplied]

The decision below states that the district court noted that Ms. Fernandes' original complaint failed to allege that the defendants were responsible for medical care which was caused by their negligence. The decision below states as follows (A. 6a):

> The district court also noted that Solomon's pleading marginally stated a cause of action and *failed to allege special damages* as required under Florida Rule of Civil Procedure 1.120(g).

Petitioner's defense was that paragraph eight of Ms. Fernandes' original complaint alleged "medical care" in a form that *strictly conformed* to two court forms authorized and approved by the Florida Supreme Court to be a "sufficient" allegation of "medical care", *as a matter of law*. The decision below states that petitioner's defense is without merit. The decision below and a portion of footnote four states as follows (A. 7a):

> After reviewing the record, we conclude that five of these issues are without merit and do not warrant discussion.
> 4 . . . First, Solomon argues that his complaint sufficiently alleged special damages and that he should not be disciplined for failing to amend it per the recommendation of the district court . . .

Petitioner also objected to the Florida Supreme Court's reversal of the referee's finding of fact that Ms. Fernandes' original complaint *did* allege the defendants to be responsible for "medical bills". The decision below states that Florida law requires that a referee's findings of fact *cannot* be reversed unless they are clearly erroneous or without competent, substantial support in the record. The decision below cites *Florida Bar* v. *Bustamonte* to support this principle of law (A. 8a). Ms. Fernandes' original complaint in paragraph eight is competent, substantial sup-

port in the record for the referee's finding of fact that Ms. Fernandes' original complaint "sufficiently" alleged "medical bills".

Judge Patterson authored the district court decision which had nothing to do with any medical care (special damages) issues. He overlooked paragraph eight of Ms. Fernandes' original complaint. Judge Patterson testified on direct examination by the Bar that Ms. Fernandes' original complaint lacked *any* allegation of medical care (special damages). His testimony on cross-examination becomes uncertain after he is shown paragraph eight of Ms. Fernandes' original complaint. On direct examination on December 4, 1996, on page nine, line twenty-four he testified as follows:

> Well, the most fundamental omission is the *lack of any allegation as to special damages*, which of course is the core of a tort case. And, without allegations of special damages, under Rule. 1.120 you cannot offer evidence on them over objections. So that's just fundamental. [emphasis supplied]

On cross-examination on December 4, 1996, on page twenty-eight he testified that the complaint *does, does not, and maybe does* sufficiently allege medical care (special damages).

> Q. All right. Thank you, Judge. Judge, would you agree that damages resulting from *medical care* and treatment would fall into the general category of special damages?
>
> A. *Yes*. Every damage in this case, in my opinion, is a special damage with the exception of-well, I can't think of an exception.
>
> Q. Judge, would you concur in the opinion that if a complaint alleged that a party had been severely beaten and received permanent injuries as a result of that beating and had received *medical care* at Tampa General Hospital as a result of that beating, would you concur that that would have sufficiently placed the defendant on notice to allow the plaintiff to recover damages?

A. *No*, I would not.

Q. And what would be the basis of your nonconcurrence?

A. The basis would be Rule 1.120(g) which requires them to be pled specifically by category as damages as a predicate to offering evidence on them. In my opinion, this complaint would not support the offering of evidence on any category of special damages.

Q. And, Judge Patterson, that would be your opinion-that despite the plaintiff's allegation of receiving *medical care* at Tampa General Hospital, it would be your opinion that does not sufficiently notice the defense of the category of medical expenses?

A. *I think that could be argued either way*. All right?

Q. So you would agree with me that that is potentially a matter that could have entitled the plaintiff to medical expense damages?

A. If a Trial Judge had rules *yes or no*, it would not have been an abuse of discretion at the appellate level in either direction. [emphasis supplied]

Justice Frederick B. Karl during his tenure on the Florida Supreme Court chaired the committee which rewrote the Rules Regulating the Florida Bar. Attorney Raymond T. Elligett, Jr. testified when he was the current chair of the Florida Bar Appellate Practice and Advocacy section. Both testified that petitioner engaged in no unethical conduct in any matters in this case.

VI(b). THIS FINDING OF GUILT IS A DEPRIVATION OF DUE PROCESS BECAUSE PETITIONER HAD NO NOTICE THAT THERE EXISTS ANY CASE LAW WHICH CAN SUPPORT THE DISPOSITION OF A VENUE CHALLENGE WHICH RESULTS IN A DISMISSAL RATHER THAN A TRANSFER. THIS IS BECAUSE NO CASE LAW EXISTS IN FLORIDA WHICH HAS EVER FOUND IT NOT TO BE REVERSIBLE ERROR TO DISPOSE OF A VENUE CHALLENGE WITH A DISMISSAL RATHER THAN A TRANSFER, AS A MATTER OF LAW.

In Ms. Fernandes' indigency case, petitioner's second alleged pleading error was that he filed her lawsuit in the county in which Tampa General Hospital is located which was not the county in which the negligence occurred or defendants' home county. This allegedly subjected the lawsuit to a *possible* dismissal rather than a transfer as a *possible* disposition to the defendants' *optional* venue challenge. This finding of guilt was upheld over the objection that *all* existing case law holds, *as a matter of law*, that the proper disposition of defendants' *optional* privilege of venue challenge is transfer and not dismissal. If disposition of Defendants' optional venue challenge was a dismissal rather than a transfer, this would have been the *first time* in Florida that such a disposition would *not* have been reversed on appeal as error, *as a matter of law*. Incidentally, Ms. Fernandes' case was transferred and settled for twenty-eight thousand dollars.

The referee's finding of guilt was based on the erroneous statement of the law that a *possible* disposition of a venue challenge may be a *possible* dismissal rather than a transfer.

> Respondent testified that he intentionally filed the suit in Hillsborough County for his own convenience even though he was aware that Pinellas County was the proper venue. *Apparently he was unaware of the possibility that if the suit were dismissed for improper venue the case might well be subject to dismissal with prejudice*. Accordingly, the referee finds that the intentional filing of the lawsuit on the last day in a clearly inappropriate venue substantially jeopardized the interest of the client, notwithstanding the fact that opposing counsel agreed later to a transfer of the case to Pinellas County. Such practice by Mr. Solomon is

sufficient to constitute a lack of competence as required under Rule 4-1.1. [emphasis supplied]

King v. *Pearlstein*, 592 So.2d 1176, 1177 (Fla. 2nd DCA 1992) coincidentally authored by Judge Patterson remains the most recent case on the proper disposition of a venue challenge in Florida. Judge Patterson's written decision in footnote two states that the *proper* disposition of a venue challenge in Florida is a transfer and not a dismissal. Judge Patterson's written decision cites *Tropicana Products, Inc.* v. *Shirley*, 501 So.2d 1373(Fla. 2nd DCA 1987).

However, in this trial in response to a question concerning medical care (special damages) Judge Patterson responds with unrelated testimony that contradicts his written decision. His unrelated, contradictory testimony is that although the case law states that the better practice in a venue challenge is a transfer, that it is not error to dismiss such a case.

Q. But you would agree with me it may possibly preclude evidence of damages other than those which have been pled?

A. Yes. I was-I normally don't footnote my opinions to the extent this one is footnoted. And I was trying to tell Mr. Solomon some observations that I had that were going to be critical to his case in the future. See, the problem with the venue issue and all the things that you've mentioned are correct. It's not jurisdictional. It can be waived and so on and so forth. The danger presented in this case is that-from what I see in the complaint, it was evidently filed after or very near the expiration of the statute of limitations-is that improper venue supports two forms of relief. One is transfer and another is dismissal. And although the case law is to the effect that if dismissal will bar the bringing of this case back because of the limitation issue, the better practice for the Trial Court is to treat it as a motion to transfer. But *it is not error to dismiss it.* So by filing it in Hillsborough County and letting the statute expire and then suffering the dismissal and the statute comes back as a bar, that is the

> specific danger that I was presented in this case. [emphasis supplied]

Petitioner's defense was that *all* existing case law in Florida holds that a *possible* disposition of defendants' *optional* venue challenge which results in a dismissal rather than a transfer is reversible error, *as a matter of law*. In Ms. Fernandes' case, if disposition of Defendants' optional venue challenge resulted in a dismissal rather than a transfer, this would have been the *first time* that such a disposition would *not* have been reversed on appeal as error, *as a matter of law*. The decision below states that petitioner's defense is without merit. The decision below and a portion of footnote four states as follows (A. 7a):

> After reviewing the record, we conclude that five of these issues are without merit and do not warrant discussion.
> 4 . . . Third, Solomon asserts that the referee's finding that filing a complaint in the improper venue can result in a dismissal with prejudice is erroneous.

VI(c). THIS FINDING IS A DEPRIVATION OF DUE PROCESS BECAUSE PETITIONER HAD NO NOTICE THAT THE "CONFUSION" AND ERRONEOUS UNDERSTANDING OF THE LAW BY THE TRIAL JUDGE WHICH WAS REVERSED ON APPEAL IS "CONFUSION" AND ERROR WHICH IS ATTRIBUTABLE TO THE ATTORNEY/PETITIONER. THIS IS ESPECIALLY TRUE BECAUSE PETITIONER ADVISED THE TRIAL JUDGE OF THE CORRECT LAW WHICH THE TRIAL JUDGE CHOSE NOT TO FOLLOW CONCERNING THE CURED AFFIDAVIT ON REHEARING.

In Ms. Fernandes' indigency case, petitioner's third alleged pleading error was that he opposed a summary judgment with a technically deficient affidavit which was cured on rehearing. The "delay" necessary to reverse the "confusion" and error of the *trial judge* on appeal was attributed to the *attorney*/petitioner. Petitioner's filing of the original technically deficient affidavit which was cured on rehearing so "confused" the trial judge "that the trial judge's grant of summary judgment was under-

standable." (A.6a.) This finding of guilt was upheld over the objection that the *trial judge's* "confusion" and erroneous understanding of the law which was reversed on appeal is not fairly attributable to the *attorney*/petitioner. Petitioner advised the trial judge of the correct law which the trial judge chose not to follow concerning the cured affidavit on rehearing.

The referee found that petitioner's filing of the original technically deficient affidavit cured on rehearing "confused" the trial judge to erroneously not consider the cured affidavit on rehearing and grant the summary judgment (A. 20a).

> In any event, a cured and properly filed affidavit executed by Ms. Fernandes was apparently filed on that date, June 2, 1993, which Judge Bonanno found to be either untimely filed or legally insufficient to raise a material issue of fact. Subsequently, the Second DCA set aside the summary judgment in favor of plaintiff through the substantial efforts of Mr. Solomon. The fact that the Second DCA subsequently reversed Judge Bonanno and found that he committed error in entering the summary judgment is not dispositive however, on the issue of whether Mr. Solomon was in violation of the Bar standards for competency. In its opinion, the DCA noted that the plaintiff's pleadings were In disarray and clearly contributed to the *confusion* surrounding the entry of the summary judgment at the outset. The fact that the Appellate Court was willing to pluck the plaintiff's chestnuts out of the fire, so to speak, does not signify that Mr. Solomon had acted competently during the summary judgment proceedings.
>
> Given the totality of the circumstances, the referee finds that Mr. Solomon's actions contributed substantially to the *delay* and consequent harm in timely litigating his client's case and finds that such action fails to meet the standards for competency under Rule 4-1.1. [emphasis supplied]

The specifically applicable case law cited to the trial judge and appellate court in Ms. Fernandes' case, and to the referee and the Florida

Supreme Court in this case is the landmark Florida Supreme Court case of *Holl* v. *Talcott*, 191 So.2d 40 (Fla.1966) most recently affirmed in *Charlonne* v. *Rosenthal*, 642 So.2d 632 (Fla. 3rd DCA 1994). These cases hold, *as a matter of law*, that summary judgment should not be granted because of technical deficiencies in the non-movant's affidavit which are cured on rehearing.

The decision below states that the district court set aside the summary judgment but noted that the trial judge's error was "understandable" due to the filing of the original technically deficient affidavit cured on rehearing (A. 6a). Petitioner's defense was that the "confusion" and erroneous understanding of the law by the *trial judge* which was reversed on appeal is not fairly attributable to the *attorney*/petitioner. Petitioner advised the trial judge of the correct law which the trial judge chose not to follow concerning the cured affidavit on rehearing. The decision below states this defense is without merit. The decision and a portion of footnote four states as follows (A. 7a):

> After reviewing the record, we conclude that five of these issues are without merit and do not warrant discussion.
> 4 . . . Second, Solomon argues that the fact that he prevailed on appeal precludes a finding of incompetence.

Due to Ms. Fernandes' indigency it was sometimes difficult to contact her. Due to Ms. Fernandes' indigency it was necessary to dictate the original affidavit to her over the telephone. The original affidavit was deficient because she inadvertently omitted the words "sworn and subscribed before me this ___ day of ___". The addition of these words cured the affidavit and were sufficient to support a reversal on appeal based upon her cured affidavit. As an aside, please recall Ms. Keene's insolvency affidavit used a form of affidavit which was similar to Ms. Fernandes' form of affidavit. The decision below rejects Ms. Keene's form of affidavit and accepts Ms. Fernandes' form of affidavit. This inconsistency is another example of the lack of notice of unethical conduct that will support a finding of guilt.

It is important to note that only technical deficiencies in an affidavit may be cured on rehearing. "New" affidavits are not admissible on rehearing. *Therefore if the technically deficient affidavit was not filed*

before the original hearing, the cured affidavit which justified reversal on appeal would not have been admissible and the case would have been lost. The *trial judge's* error in choosing not to follow petitioner's correct legal advice to consider the cured affidavit on rehearing cannot fairly be attributed to *petitioner*. If petitioner did not properly preserve this error for appeal in the record by raising this error with the trial judge, the error would not have been properly preserved for review and the appeal would have failed. The "delay" caused by the successful exercise of Ms. Fernandes' legal right to an appeal cannot justify the finding of guilt in the decision below of unethical conduct.

Furthermore, all evidence concerning this alleged pleading error was precluded and stricken from the record by the referee. The referee ruled such evidence was "irrelevant" to any of the charges in writing in the Bar's complaint (A. 32a). Nonetheless the referee and the decision below found guilt on this alleged pleading error despite no notice, no hearing and no record evidence.

REASONS FOR GRANTING CERTIORARI.

I. FINDINGS OF GUILT THAT WERE NEVER CHARGED IN WRITING IN THE BAR'S COMPLAINT ARE A DEPRIVATION OF DUE PROCESS.

Petitioner was deprived of due process because he had *never* been given any notice in writing in the Bar's complaint or otherwise that he was to be tried for *three* of the five findings of guilt found in the decision below. *Three* of the five findings of guilt found in the decision below were *never* charged in writing in the Bar's complaint.

Compromise of the notice and hearing requirements of due process is no due process. The notice and hearing requirements of due process cannot be compromised in attorney disciplinary proceedings. *In re Ruffalo*, 390 U.S. 544 (1968), 88 S.Ct. 1222, 20 L.Ed.2d 117. *In re Ruffalo* held that the "precise nature of the charges" must be included in writing in the Bar's complaint before the commencement of the proceedings in attorney disciplinary proceedings. *In re Ruffalo* reversed the Ohio Supreme Court's suspension of an attorney because the findings of guilt that supported the suspension were not charged in writing in the Bar's complaint *before* the proceedings commenced. The facts in our case are

even more compelling. In *In re Ruffalo*, the "precise nature of the charges" were contained in an amended complaint filed *after* the proceedings commenced. In our case the "precise nature of the charges" in writing in the Bar's complaint were *never* filed. *In re Ruffalo* on page 1226 holds that the Ohio Supreme Court's suspension of an attorney must be reversed because the absence of the precise nature of *even one* of the charges in writing in the Bar's complaint before the proceedings commenced is a deprivation of due process.

> These are adversary proceedings of a quasi-criminal nature. *In re Gault*, 387 U.S. 1, 33; 87 S.Ct. 1428, 1446, 18 L.Ed.2d 527. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> How the charge would have been met had it been originally Included In those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.
>
> This absence of fair notice as to the reach of the grievance procedure and the *precise nature of the charges* deprived petitioner of procedural due process. [emphasis supplied]

In re Ruffalo on page 1226 also requires that the "precise nature of the charges" in writing must be given before the proceedings commence to afford the petitioner the "opportunity for explanation and defense".

The *three* of the five findings of guilt in our case which were *never* charged in writing in the Bar's complaint are as follows. The first uncharged finding of guilt is that Mrs. Breen was allegedly harmed by the thirty nine day "delay" described as "protracted litigation" which was caused by the appeal of a non-final order. The second uncharged finding of guilt is that Ms. Fernandes was allegedly harmed by the *possibility* that the disposition of defendants' *optional* venue challenge *may* have resulted in a *possible* dismissal rather than a transfer. The third uncharged finding of guilt is that Ms. Fernandes was allegedly also harmed

by the "delay" that was caused by the time required for her successful appeal of the trial judge's erroneous final order.

There were no charges in writing in the Bar's complaint to support the first uncharged finding of guilt. This is because the Bar's complaint recited only the fact that Mrs. Breen appealed the non-final order. This fact was admitted. The Bar's complaint nowhere alleged that the client was harmed by the thirty nine day "delay" described as "protracted litigation" which was caused by her appeal of the non-final order. Recitation only of the fact of her appeal of the non-final order, without more, is not fair and adequate notice that affords an "opportunity for explanation and defense" to the unwritten "charge" that Mrs. Breen was harmed by the thirty-nine day "delay" described as "protracted litigation" which was caused by her appeal of the non-final order.

There were no charges in writing in the Bar's complaint to support the second uncharged finding of guilt. This is because the Bar's complaint only recited the fact that Ms. Fernandes' complaint was filed in Hillsborough County. This fact was admitted. The Bar's complaint also recited that venue is "proper" in Pinellas County. The venue statute uses the word "proper" to describe the "proper" county to which venue *may* be transferred *if* the defendant chooses to exercise his *optional* privilege of venue challenge. The Bar's complaint nowhere alleged the *possibility* for harm to Mrs. Fernandes if the defendants' optional venue challenge had resulted in a possible dismissal rather than a transfer. Recitation only of the fact that her complaint was filed in Hillsborough County and that venue is "proper" in Pinellas County, without more, is not fair and adequate notice that affords an "opportunity for explanation and defense" to the unwritten "charge" that there is a *possibility* for harm to Mrs. Fernandes if the defendants' optional venue challenge had resulted in a possible dismissal rather than a transfer. This is especially true because in Florida *every* such dismissal has *always* been reversed on appeal as error, *as a matter of law*.

There were no charges in writing in the Bar's complaint to support the third uncharged finding of guilt. This is because the Bar's complaint recited only the facts that in Ms. Fernandes' case an original affidavit which was technically deficient was filed, a cured affidavit on rehearing was filed, and that she successfully appealed the trial judge's erroneous final order. All of these facts were admitted. The Bar's complaint nowhere alleged that the *trial judge's* "confusion" and erroneous under-

standing of the law applicable to *cured* affidavit on rehearing was unethical conduct attributable to the *attorney*/petitioner. The Bar's complaint nowhere alleged that the "delay" necessitated by Ms. Fernandes' successful appeal of the trial judge's erroneous final order caused her harm and is unethical conduct attributable to *petitioner*.

Recitation in the Bar's complaint only of the facts that in Ms. Fernandes' case an original affidavit which was technically deficient was filed, a cured affidavit on rehearing was filed, and that she successfully appealed the trial judge's erroneous final order, without more, is not fair and adequate notice that affords an "opportunity for explanation and defense" to the unwritten "charge" that the *trial judge's* "confusion" and erroneous understanding of the law applicable to her cured affidavit on rehearing, which resulted in the "delay" necessitated by the successful appeal of the trial judge's erroneous final order, caused harm to Ms. Fernandes which is unethical conduct attributable to the *attorney*.

In re Ruffalo reversed the Ohio Supreme Court's suspension order because the amended complaint which contained the "precise nature of the charges" in writing which was filed *after* the proceedings had commenced was *filed too late* to provide fair and adequate "opportunity for explanation and defense". The facts in our case are even more compelling. This is because an amended complaint which contained the "precise nature of the charges" in writing was *never* filed in our case. Petitioner first had notice of *three* of the five unwritten "charges" which resulted in findings of guilt only after the completion of the trial. Such "notice" does not comply with the notice required by *In re Ruffalo*.

The Florida Supreme Court's decision below is in direct conflict with the U.S. Supreme Court's decision in *In re Ruffalo*. According to the U.S. Supreme Court's decision in *In re Ruffalo* the fact in our case that *three* of the five alleged pleading errors ("specific instances of misconduct") were *never* charged in a "precise nature" in writing in the Bar's complaint deprived petitioner of due process. However, according to the Florida Supreme Court's decision in our case the fact in our case that *three* of the five alleged pleading errors ("specific instances of misconduct") were *never* charged in a precise nature in writing in the Bar's complaint *did not* deprive petitioner of due process. The decision below in our case states that due process under Florida law does *not* require that the precise nature of the charges ("specific instances of miscon-

duct") ever be charged in writing in the Bar's complaint in an attorney disciplinary proceeding. The decision below states as follows (A. 7a):

> In the first of the issues we do address, Solomon contends that the referee violated his due process rights by recommending that he be found guilty of *specific instances of misconduct that were not charged in the Bar's complaint. We Disagree.* This Court has repeatedly recognized that the referee's report may include evidence of unethical conduct "not squarely within the scope of the Bar's accusations" when "it is relevant to the question of the respondent's fitness to practice law and thus relevant to the discipline to be imposed." *Florida Bar* v. *Stillman*, 401 So.2d 1306, 1307 (Fla. 1981); *Florida Bar* v. *Nowacki*, 697 So.2d 828 (Fla. 1997) (referee's recommendation as to guilt is valid despite Bar complaint not specifically charging respondent with underlying instances of misconduct). The referee's report issued in this case references conduct that was clearly within the scope of the Bar's accusations. We find that Solomon was properly and adequately notified of the nature and extent of the charges against him. [emphasis supplied]

The above citation from the decision below relies on *Florida Bar* v. *Stillman* and *Florida Bar* v. *Nowacki* to justify its holding that "specific instances of misconduct" that are *never* charged in writing in the Bar's complaint *can* support findings of guilt. These two cases cannot justify this holding. *Florida Bar* v. *Stillman* involved an attorney's felony conviction for theft of client funds which also resulted in an attorney disciplinary proceeding. There were no findings of *guilt* which were based on "specific instances of misconduct" which were *never* charged in writing in the Bar's complaint. The referee's report included the attorney felon's unrelated prior criminal record to impose appropriate *discipline only after* there was a finding of *guilt*. The attorney's unrelated prior criminal record had no proper place in this complaint. This is because the attorney felon's unrelated prior criminal record was irrelevant to the allegations concerning *guilt* in this case's complaint. However, the attorney felon's unrelated prior criminal record was relevant to the appropriate *discipline* to be imposed *only after* there was a finding of *guilt*. There-

fore, the referee's report which included the unrelated prior criminal record "included evidence of unethical conduct not squarely within the scope of the Bar's [guilt] accusations". This evidence was relevant to impose *discipline* and irrelevant to establish *guilt*. This evidence was used to impose *discipline only after* there was a finding of *guilt*. Therefore, the facts in *Florida Bar* v. *Stillman* cannot fairly be interpreted to justify the holding in our case that "specific instances of misconduct" that were *never* charged in writing in the Bar's complaint *can* support findings of *guilt*.

In *Florida Bar* v. *Nowacki* the Bar's complaint in paragraph ten charged the attorney with the "specific instances of misconduct" which resulted in her guilt. The Bar's complaint in paragraph ten charged that the attorney,

> . . . failed to timely and diligently pursue the legal matters for which she had been retained by Mr. Ludecker . . . [and] failed to adequately respond to Mr. Ludecker's numerous written and telephonic inquiries or provide him with information about his case.

The attorney was found guilty of failing to diligently pursue Mr. Ludecker's divorce case and of failing to adequately communicate with him about his case. The attorney claimed that she was deprived of due process because she was not specifically charged with failing to take any action to "pursue settlement" and not specifically charged with "failing to provide him with his file as requested". Even the *Florida Bar* v. *Nowacki* decision states that the attorney was clearly notified in writing in the complaint with charges of the "specific instances of misconduct" for which she was to be tried before the proceedings commenced. Therefore, the facts in *Florida Bar* v. *Nowacki* also cannot fairly be interpreted to justify the holding in our case that "specific instances of misconduct" that were *never* charged in writing in the Bar's complaint *can* support findings of *guilt*. Similarly, *Florida Bar v. Nowacki's* reliance on *Florida Bar v. Stillman* cannot fairly be interpreted to justify the holding in *Florida Bar* v. *Nowacki* that "specific instances of misconduct" that were *never* charged in writing in the Bar's complaint *can* support findings of *guilt*. Such a holding has no bearing to the facts of *Florida Bar* v. *Nowacki* or *Florida Bar* v. *Stillman*. The referee's report

in *Florida* v. *Stillman* included evidence to impose *discipline* which was not within the Bar's accusations to establish *guilt*. However, *Florida Bar* v. *Stillman's* findings of *guilt were* based on charges in writing in the Bar's complaint of "specific instances of misconduct." *Florida Bar* v. *Nowacki's* findings of *guilt* also *were* based on charges in writing in the Bar's complaint of "specific instances of misconduct". Therefore, the holding below that "specific instances of misconduct" which were *never* charged in writing in the Bar's complaint *can* support findings of guilt is based on two cases in which the findings of guilt *were* based on "specific instances of misconduct" which *were* charged in writing in the Bar's complaint.

II. FLORIDA LAW ALSO VIOLATES EQUAL PROTECTION BECAUSE SPECIFIC CHARGES IN WRITING IN THE COMPLAINT ARE REQUIRED IN FLORIDA FOR ALL PROFESSIONS EXCEPT THE LEGAL PROFESSION.

Judges and lawyers in Florida are regulated by the Florida Bar. All other professionals are regulated by an independent state administrative agency. Florida administrative law requires specific charges in writing in a complaint. The law for the legal profession therefore is different from the law for all other professions. As recently as July 15, 1998, a former Florida Supreme Court Justice applied administrative law to reverse a finding of guilt by the agency because the agency failed to state the specific charge in writing in the complaint against a doctor. *Abdul Ghani, M.D.* v. *Dept. of Health*, 23 Fla.L.WeekLy D1677 (Fla. 1st DCA 1998). Florida law therefore also violates equal protection because there is no rational basis for such arbitrary discrimination in the discipline of the legal profession from all other professions.

III. THE DECISION BELOW REQUIRES REVERSAL BECAUSE THE BAR'S MISCONDUCT SIGNIFICANTLY TAINTED THE FINDINGS OF GUILT BASED ON JUDGE PATTERSON'S TESTIMONY.

The decision below requires reversal because the Bar's misconduct significantly tainted the findings of guilt based on Judge Patterson's tes-

timony. Petitioner voluntarily submitted to a mental competency examination by a licensed professional at the Bar's request in efforts to satisfy and cooperate with them. The results of this examination were completely normal. The fact of this examination was confidential and not related to this case. The Bar improperly disclosed the fact of this examination to Judge Patterson. The Bar improperly created the false impression for Judge Patterson that the results were other than normal. Petitioner's request for re-trial of the findings of guilt in Ms. Fernandes' case based on this misconduct was denied (A. 24a).

IV. DISCIPLINE TO BE IMPOSED.

Even assuming the findings of guilt are upheld, the discipline imposed of an indefinite suspension is not appropriate. Assuming that guilt is upheld then Mrs. Breen was harmed by the thirty-nine day "delay" that was caused by the appeal of a non-final order. Ms. Fernandes was harmed by the *possible* preclusion of medical bills at trial, the *possibility* that the defendants' optional venue challenge may have resulted in a *possible* dismissal rather than a transfer, and the "delay" necessitated by the successful appeal of an erroneous final order. There is no alleged harm to Ms. Keene because the district court's decision stated that Ms. Keene's petition would have been denied on the merits regardless of any question raised concerning the sufficiency of her insolvency affidavit.

The actual result in Ms. Breen's case was that the case was "delayed" during the thirty-nine days which the appeal of the non-final order remained pending. The actual result in Ms. Fernandes' case was that the case was transferred[1] and settled for twenty-eight thousand dollars before trial. The *possible* harm to Ms. Fernandes of a *possible* dismissal after the defendants' optional venue challenge never occurred. The *possible* harm to Ms. Fernandes of the *possible* preclusion of the admission of her medical bills into evidence at trial also never occurred. There was a "delay" necessitated by the successful appeal of the trial judge's erroneous final order. Ms. Fernandes testified strongly in favor of petitioner

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[1] Ms. Fernandes' case was transferred after the appeal. The appeal had nothing to do with venue. If Judge Patterson had not made extensive footnotes regarding venue, there probably never would have been a venue challenge and transfer.

well before her case was settled. Ms. Fernandes was compelled to compose the unsolicited correspondence that describes this proceeding supposedly in her best interests as a "travesty of justice" (A. 35a). Even assuming guilt is upheld, the discipline imposed of an indefinite suspension is not appropriate.

CONCLUSION.

The petition for certiorari should be granted.

Respectfully submitted,

DAVID SOLOMON
880 Mandalay Avenue
Suite N-911
Clearwater, Florida 33767-1229
(727) 442-8600

APPENDIX
TABLE OF CONTENTS.

APPENDIX A
Opinion of the Supreme Court of Florida 1a

APPENDIX B
Referee's findings of guilt and supporting findings of fact 13a

APPENDIX C
Order of the Supreme Court of Florida denying petitioner's timeiy motion for rehearing 24a

APPENDIX D
Florida Law Weekly headnote 25a

APPENDIX E
Petitioner's motion for rehearing based on findings of guilt for unethical conduct which were never charged in writing in the Bar's complaint 26a

APPENDIX F
Petitioner's cover and table of contents to his initial brief 29a

APPENDIX G
Trial transcript in which the referee sustained objections to evidence which was "irrelevant" to any charges of unethical conduct in writing in the Bar's complaint. The referee and the Supreme Court of Florida subsequently upheld guilt on this alleged unethical conduct 32a

APPENDIX H
Ms. Fernandes' unsolicited correspondent written after her testimony and offered in evidence 35a

APPENDIX A.

Supreme Court of Florida

THE FLORIDA BAR,
Complainant,

vs.

DAVID LAWRENCE SOLOMON,
Respondent.

Nos. 86,914, 87,667, 88,762

[February 26, 1998]

PER CURIAM.

David Lawrence Solomon petitions this Court for review of the referee's findings and recommendations in these three consolidated Florida Bar disciplinary proceedings. The Florida Bar cross-petitions for review. We have jurisdiction. Art. V, § 15, Fla Const. For the reasons expressed, we approve the referee's findings and recommendations as to guilt, but modify the referee's recommendations as to discipline to include a requirement that Solomon take and pass Parts A and B of the Florida Bar Examination prior to reinstatement and exclude a requirement that Solomon obtain the assistance of co-counsel during the term of his probation.

The Bar filed three complaints against Solomon alleging various violations of rule 4-1.1 (competent representation) and rule 4-1.3 (reasonable diligence and promptness) of the Rules Regulating the Florida Bar Hillsborough County Judge Donald F. Castor was appointed referee and the cases were consolidated.

FINDINGS OF FACT

In pertinent part, the referee's findings of fact in two separate disciplinary proceedings were as follows.

Case No. 86,914

This case contains four separate counts. Count I involves Solomon's representation of Clyde and Cynthia Poole against C.F.

Industries, Inc. Following a hung jury in the first trial, Solomon made numerous legal errors at the second trial that resulted in a directed verdict for the defendant. Solomon appealed the directed verdict and the Second District Court of Appeal reversed.[1]

On remand, Solomon filed a petition for certiorari claiming that he did not receive thirty days' written notice of the scheduling of the date of the third trial. Solomon failed to pay the filing fee or submit an affidavit of insolvency and the petition was dismissed. Prior to trial, nonbinding arbitration was ordered by the judge. The arbitrators found the defendant liable for damages, but the Pooles refused the award. In contravention of section 44 103(5), Florida Statutes (1993), Solomon filed a request with the trial judge to adopt the arbitrators' finding of liability. The request was denied, and the subsequent jury trial resulted in a verdict for the defendant.

Solomon's appeal of the verdict was initially dismissed after he failed to timely submit the initial brief. The district court's order of dismissal admonished Solomon for repeatedly ignoring the requirements of the Florida Rules of Appellate Procedure. The district court subsequently reinstated the appeal to avoid prejudice to Solomon's clients.

Solomon testified before the referee that the Poole case was his first jury trial, and that he had consulted with other attorneys and diligently researched the issues in preparation for trial. Solomon also testified that the hung jury in the first trial caused him to believe that his clients could ultimately prevail. Clyde Poole testified that he believed he was fortunate to have Solomon represent him.

Count II involves Solomon's representation of three women as personal representatives of their deceased children against the Florida Department of Transportation. A summary judgment was entered in favor of the department. Solomon appealed and the district court affirmed the summary judgment. The Florida Bar

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[1] In his initial brief in that case, Solomon inappropriately noted, apparently in an attempt at humor, that the appellee's attorney had the same last name as person in a cited case who was convicted of burglary and assault with intent to commit rape with a deadly weapon.

argued before the referee that Solomon repeatedly misrepresented the facts in the record on appeal.

Count III involves Solomon's representation of an alleged stabbing victim. Solomon filed the complaint in Hillsborough County, but the trial judge transferred venue to Duval County. Solomon filed a notice of appeal of the trial court's venue order on December 1, 1991. Delays in the appeal were caused by Solomon's failure to timely remit the filing fee or an affidavit of insolvency. Moreover, in response to Solomon's irregularly captioned motions, the district court granted extensions to file the initial brief and reply brief. The reply brief was finally filed on September 8, 1992. Despite the delays, the district court "reluctantly overturned the trial court's order and remanded the matter for further proceedings on the venue question. Breen v. Huntley Jiffy Stores, 610 So. 2d 29, 30 (Fla. 2d DCA 1992). On April 17, 1993, the trial court rendered a second order transferring venue to Duval County. On July 7, 1994, Solomon appeal the second venue order. For the second time in the same case, Solomon failed to remit a filing fee or file an affidavit of insolvency. The district court warned Solomon that failure to timely remit the fee or file proof of insolvency would result in a dismissal. Solomon opted to ignore the court's warning and filed a motion for extension of time to pay the filing fee and submit his initial brief. The district court dismissed the appeal, thus finally resolving the venue question, on August 16, 1994.

Count IV involves Solomon's appeal of an adverse ruling by the Florida Unemployment Appeals Commission. The Bar alleged that Solomon presented erroneous arguments on appeal regarding the holding of a cited case.

As to count V, Solomon filed an appeal on behalf of a plaintiff without paying the filing fee or submitting an affidavit of insolvency. Solomon's request for an extension to submit the fee or affidavit was denied and the appeal was dismissed. Upon the untimely payment of the fee, the appeal was reinstated. Solomon's subsequent motion for an extension of time to file the initial brief was denied.

As to count VI, Solomon appealed a trial court's ruling denying the subsequent administration of an estate. The district court

affirmed the ruling of the trial court and remanded the matter. The trial court granted the defendant's motion to enforce the appellate mandate and denied Solomon's motion for rehearing. Solomon then appealed the trial court's order enforcing the mandate. The appellee sought sanctions against Solomon for filing a frivolous appeal, and Solomon voluntarily dismissed the appeal.

Case No. 87,667

Solomon represented the plaintiff in a personal injury action stemming from an automobile accident. In response to the defendant's discovery requests, Solomon sought a protective order to limit the disclosure of his client's medical history. The trial court admonished all counsel to refrain from disclosing without court order any information regarding the plaintiff's emotional or physical condition unrelated to the injuries sustained in the accident.

In response to the order, Solomon filed an oddly captioned petition for writ of certiorari that referred to psychotherapy received by his client for abuse as a child. Solomon failed to pay the filing fee or submit proof of insolvency with the petition. After being warned that the petition was subject to dismissal, Solomon sought an extension of time to prove his client's insolvency. In response to Solomon's request, the district court ordered him to appear and show cause why he should not be sanctioned for his repeated failure to pay filing fees or submit insolvency affidavits.[2] In response to the show cause order, Solomon filed a document resembling an affidavit that was intended to demonstrate his client's insolvency. Of this document, and Solomon's actions in general, the district court wrote, "It is apparent from Mr. Solomon's presentation at the hearing on the order to show cause that he is not willfully disobeying our orders, but he does not understand the basic procedures for establishing indigency status in an appellate proceeding." Keene, 661 So. 2d at 43. Following the show cause hearing, the district court ordered Solomon to complete at least ten hours of continuing legal education in appellate procedure.

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[2] Solomon had failed on at least ten occasions in the preceding twenty-five months to file appeals with the proper fee or affidavit of insolvency. Keene v. Nudera, 661 So. 2d 40, 43 (Fla. 2d DCA 1995)

The district court ultimately dismissed the petition for certiorari, finding the "affidavit" of insolvency to be insufficient. Evidently, the document contained no formal oath and was not in the standard language of an affidavit. Undeterred, Solomon petitioned this Court to review the decision of the district court. This Court denied the petition and also denied Solomon's motion for reinstatement of the petition.

Judge Altendbernd of the Second District Court of Appeal testified before the referee that he was not aware of any other attorney who had repeatedly failed to remit filing fees or proof of insolvency with their appeals. Judge Altenbernd also testified that the Second District generally reinstated Solomon's appeals solely to avoid prejudice to his clients.

Case No. 88,762

Solomon represented Elisa Fernandes in a personal injury action against the owners of the property upon which Fernandes was beaten. Solomon testified before the referee that because he only had a few hours to prepare and file the complaint prior to the running of the statute of limitations, he filed the suit in the wrong county for his own convenience. Furthermore, only one of the defendants was served. The defendant filed a motion to transfer venue and a motion for summary judgment. In response to the motions, Solomon filed a document, apparently intended as an affidavit, entitled "Notice of Filing," to which he attached a two-paragraph statement handwritten by Fernandes regarding her residence at the time of the battery. This statement was notarized and taped to a piece of paper. A cured affidavit was eventually filed. However, the judge found the affidavit insufficient and granted the summary judgment.

Solomon appealed the summary judgment. The district court framed its perception of the appeal as follows:

> We are thus confronted with the question of whether the trial court abused its discretion in refusing to rescue Fernandes from the apparent incompetence of her lawyer. We recognize the broad discretion of the trial court in matters of this kind. While we do not know the underlying

> reasons which compelled [Solomon] to pursue this matter in the way that he did, it is apparent to us that something has gone awry.

Fernandes v. Boisvert, 659 So. 2d 412, 413 (Fla. 2d DCA 1995)(footnote omitted).[3] The district court set aside the summary judgment but noted that Solomon's pleadings were in such disarray that the trial judge's grant of summary judgment was understandable. The district court also noted that Solomon's pleading marginally stated a cause of action and failed to allege special damages as required under Florida Rule of Civil Procedure 1.120(g).

Despite the courts' warning, Solomon chose not to amend the complaint to include an allegation of special damages. Solomon claimed he did not amend the complaint because he did not want to afford the defendant an opportunity to amend its affirmative defenses. However, the defendants had already so moved.

RECOMMENDATIONS REGARDING GUILT AND DISCIPLINE

The referee recommended that Solomon be found not guilty of violating rules 4-1.1 and 4-1.3 with respect to counts I, II, IV, V, and VI of case No. 86,914. However, the referee recommended that Solomon be found guilty of violating rules 4-1.1 and 4-1.3 with regard to count III. In addition, the referee recommended that Solomon be found guilty of violating rule 4-1.1 with respect to case No. 87,667 and case No. 88,762. The referee then recommended that Solomon be suspended for ninety-one days and thereafter until reinstated and that he be ordered to pay the costs incurred by the Bar. The referee also recommended that upon Solomon's reinstatement, Solomon be placed on probation for two years subject to certain terms and conditions. In making his recommendation, the referee considered the following factors in aggravation: multiple offenses; pattern of misconduct, and refusal to acknowledge wrongful nature of conduct. We note that the referee found an absence of dishonest or selfish motive in mitigation. The

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[3] The district court stated, "We know of no CLE program which would address the errors of the fundamentals of pleading and procedure that appear here." Fernandes, 659 So. 2d at 413 n.5.

referee also considered that Solomon was admitted to the Bar in 1983 and had received a private reprimand in 1990.

ANALYSIS AS TO GUILT

Solomon raises a total of eight issues. After reviewing the record, we conclude that five of these issues are without merit and do not warrant discussion.[4] In the first of the issues we do address, Solomon contends that the referee violated his due process rights by recommending that he be found guilty of specific instances of misconduct that were not charged in the Bar's complaint. We disagree. This Court has repeatedly recognized that the referee's report may include evidence of unethical conduct "not squarely within the scope of the Bar's accusations" when "it is relevant to the question of the respondent's fitness to practice law and thus relevant to the discipline to be imposed." Florida Bar v. Stillman, 401 So. 2d 1306, 1307 (Fla. 1981), Florida Bar v. Nowacki, 697 So. 2d 828 (Fla. 1997)(referee's recommendation as to guilt is valid despite Bar complaint not specifically charging respondent with underlying instances of misconduct). The referee's report issued in this case references conduct that was clearly within the scope of the Bar's accusations. We find that Solomon was properly and adequately notified of the nature and extent of the charges against him.

Solomon next argues that the findings and conclusions of the referee in cases 87,667 and 88,762 are not supported by competent and substantial evidence. As to case No. 87,667, Solomon contends that the referee's findings and conclusions cannot stand

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[4] The first three issues concern case No. 88,762. First, Solomon argues that his complaint sufficiently alleged special damages and that he should not be disciplined for failing to amend it per the recommendation of the district court. Second, Solomon argues that the fact that he prevailed on appeal precludes a finding of incompetence. Third, Solomon asserts that the referee's finding that filing a complaint in the improper venue can result in a dismissal with prejudice is erroneous. Fourth, as to case No. 87,667, Solomon argues that captioning a motion with the title to a statute does not evidence incompetence. Fifth, as to case No. 86,914, Solomon asserts that filing an interlocutory appeal does not delay litigation.

because they are based on evidence stricken from the record. The Bar agrees that the referee struck all evidence relating to the sexual assault and child abuse references in the titles of Solomon's motions. However, the Bar argues that, despite the stricken testimony, the record clearly establishes that Solomon acted incompetently in this case.

A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. If the referee's findings are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. Florida Bar v. Bustamante, 662 So. 2d 687 (Fla. 1995). The record reveals that Solomon's repeated failure to remit filing fees or submit proof of insolvency with his appeals frustrated the Second District Court of Appeal to the extent that Solomon was summoned to show cause and sanctioned for his incompetence. Solomon's attempt to prove his client's indigency was unconventional and ultimately failed. The interests of his client were clearly harmed by his incompetence. We conclude that the record contains competent and substantial evidence supporting the referee's recommendation that Solomon be found guilty of violating rule 4-1.1 in case No. 87,667.

At to case No. 88,762, Solomon likewise asserts that the findings and conclusions of the referee are based on inadmissible evidence. Specifically, Solomon claims that the referee struck all evidence regarding his opposition to the summary judgment motion, and without this evidence, the conclusions of the referee cannot stand. Our review of the record reveals that the referee sustained objections to the relevancy of certain testimony regarding Solomon's handling of the summary judgment appeal. However, the record clearly reveals that the referee admitted other substantial and competent evidence regarding Solomon's representation in the appeal. We conclude that the record supports the referee's recommendation of guilt in case No. 88,762.

In its cross-petition for review, the Bar claims that the referee's findings of fact as to counts I, II, IV, V, and VI of case No. 86,914 demonstrate that Solomon violated rules 4-1.1 and 4-1.3. The Bar also claims Solomon violated rule 4-1.3 in case No.

87,667. Finally, the Bar argues that the referee erroneously required that actual harm or prejudice to Solomon's clients be shown as an element of incompetence or lack of diligence. We agree with the Bar that actual harm or prejudice is not an element of incompetence or lack of diligence under the Rules Regulating the Florida Bar. See Florida Bar v. Littman, 612 So. 2d 582 (Fla. 1993). Regardless, after reviewing the record, we conclude that the referee's findings are supported by competent, substantial evidence.

ANALYSIS AS TO DISCIPLINE

While a referee's recommendation for discipline is persuasive, this Court has the ultimate responsibility to determine the appropriate sanction. Florida Bar v. Reed, 644 So. 2d 1355 (Fla. 1994). A bar disciplinary action must serve three purposes: the judgment must be fair to society, it must be fair to the attorney, and it must be severe enough to deter other attorneys from similar misconduct. Florida Bar v. Lawless, 640 So. 2d 1098 (Fla. 1994).

As discussed in detail in this opinion, this case involves the persistent failure of Solomon to competently represent his clients and comply with basic rules of civil and appellate practice and procedure. The nature of Solomon's conduct is inexplicable. His incompetence and lack of diligence have affected many of his clients, some of whom were clearly harmed as a result of his actions. Moreover, Solomon's incompetence has been demonstrated in pre-trial, trial, and appellate proceedings. Based on his findings and conclusions and the aggravating and mitigating factors, the referee found a ninety-one day suspension and two year probation following reinstatement to the practice of law to be the appropriate discipline. We find that the circumstances clearly justify the approval of the suspension and probation recommended by the referee. However, we decline to adopt the referee's recommendation that Solomon obtain co-counsel in all pending and future litigation matters during the term of probation. We do find there must be appropriate supervision during Solomon's probationary period and that Solomon must take and pass parts A and B of the Florida Bar Examination as a condition of reinstatement.

Accordingly, David Lawrence Solomon is hereby suspended for ninety-one days. The suspension will be effective thirty days from the filing of this opinion so that Solomon can close out his practice and protect the interests of existing clients. If Solomon notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Solomon shall accept no new business from the date this opinion is filed until the suspension is completed. Solomon shall take and pass Parts A and B of the Florida Bar Examination prior to filing a petition for reinstatement to the practice of law in this state.

Upon reinstatement, Solomon will be placed on probation for a period of two years. During the term of the probation, Solomon shall forward quarterly reports to The Florida Bar listing all clients and the nature and status of the matter. In addition, within ten days after reinstatement, Solomon shall contact the Law Office Management and Advisory Service (LOMAS) and undergo an office procedures and record-keeping analysis. Solomon shall cooperate with LOMAS in the conduct of the analysis and shall fully comply with and implement, at his sole cost and expense, all recommendations made by LOMAS. The LOMAS analysis shall consist of, at a minimum, an initial review within thirty days of the date of reinstatement and a final review six months prior to termination of the discipline ordered herein, confirming compliance with and implementation of the recommendations of LOMAS. LOMAS may require such additional interviews or reviews as it may, in its sole discretion, deem necessary or advisable. Solomon shall pay all fees and expenses of LOMAS incurred or required in connection with the conduct of its analysis LOMAS shall provide the Lawyer Regulation Department of The Florida Bar with status reports as to the ordered analysis. We also enter judgment against Solomon in favor of The Florida Bar for costs in the amount of $11,600.23, for which sum let execution issue.

It is so ordered.

OVERTON, SHAW, HARDING and WELLS, JJ., and GRIMES, Senior Justice, concur.

KOGAN, C.J., concurs in part and dissents in part with an opinion, in which ANSTEAD, J., concurs.

THE FILING OF A MOTION FOR REHEARING SHALL NOT LATER THE EFFECTIVE DATE OF THIS SUSPENSION.

KOGAN, C.J., concurring in part and dissenting in part.

I concur as to the findings of the Court that the respondent is guilty of violating the rules governing professional conduct and agree with the court's imposition of a ninety-one day suspension, as well as a two-year probation upon reinstatement. However, I cannot see where a retaking of the Bar examination by the respondent will in any way determine under the facts of these cases his competency to practice law. I feel that, based upon all of these cases, we should require the respondent to submit to a mental competency examination by a licensed professional in order to assist him in attaining the level of competency necessary for him to meet his responsibilities as a lawyer.

ANSTEAD, J., concurs.

Original Proceeding - The Florida Bar

John F. Harkness, Jr., Executive Director and John A. Boggs, Staff Counsel, Tallahassee, Florida; and Joseph A. Corsmeier, Assistant Staff Counsel, Tampa, Florida,

for Complainant

Donald A. Smith, Jr. of Smith & Tozian, Tampa, Florida; and Richard Greenberg, Tallahassee, Florida; and David L. Solomon, Clearwater, Florida,

for Respondent

COPY

Clerk
Supreme Court of Florida

By /s/_____
Deputy Clerk

APPENDIX B.

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,	Case No. 86,914
	TFB No. 94-11,299 (6E)
Complainant,	TFB No. 95-10,269 (6E)
v.	TFB No. 95-10,617 (6E)
	TFB No. 95-10,618 (6E)
DAVID LAWRENCE	TFB No. 95-10,619 (6E)
SOLOMON,	TFB No. 95-10,621 (6E)
	Case No. 87,667
Respondent.	TFB No. 95-11,780 (6E)
	Case No. 88,762
	TFB No. 96-10,630 (6E)

_____/

January 6, 1997
Tampa,
Florida

REPORT OF REFEREE

APPEARANCES:

For the Complainant:

Joseph A. Corsmeier, Esquire
Tampa Airport Marriott Hotel
Suite # C-49
Tampa, Florida 33607

For the Respondent:

Donald A. Smith, Jr., Esquire
109 North Brush Street
Suite #150
Tampa, Florida 33602

Richard A. Greenberg, Esquire
300 West Park Avenue
Tallahassee, Florida 32399

Count III
TFB No. 95-10, 617 (6E)
Complaint of The Florida Bar - Breen v. Huntley-Jiffy Stores

Respondent pursued two separate appeals before the Second DCA in the trial courts order transferring venue from Hillsborough County to Duval County. The incident giving rise to the lawsuit occurred in Duval County on March 21, 1987, when the plaintiff was stabbed at or near a phone booth. The initial notice of appeal of the trial court's order transferring venue to Duval County was filed on December 2, 1991.

* * * * *

Inasmuch as the Second DCA saw fit to grant Respondent's numerous motions for additional to prosecute the first notice of appeal, and ultimately adopted Respondent's position by overturning the initial ruling of the trial court, there does not appear to be sufficient evidence of incompetence or lack of diligence by Respondent with respect to the first notice of appeal.

The remaining issue is to the manner in which Respondent dealt with the filing of the second notice of appeal. It appears clear that following the trial court's second order transferring venue to Duval County on April 7, 1993, and inasmuch as the incident giving rise to the lawsuit occurred on March 21, 1987, the interest of the client would be best served by adopting one of two possible courses of action. One, undertaking to conclude the case in Duval County on a timely basis, or two, if in good faith Respondent believed that a second appeal was in the best interest of his client, not only to file the second notice of appeal on a timely basis but to vigorously pursue it.

Respondent chose however, to file the second notice of appeal, thus delaying the timely completion of litigation in Duval County and then by failing to timely file the second notice of appeal brief or notice of appeal, suffered the dismissal of the second appeal on August 16, 1994.

For these reasons, the referee finds that the interest of Respondent's client was clearly damaged by the protracted litigation and constitutes sufficient grounds for finding that Respondent has violated Rule 4-1-1, competency and Rule 4-1-3, diligence.

* * * * *

Supreme Court Case No. 87. 667
TFB NO. 95-11. 780 (6E)
Keene v. Nudera

In 1993, Respondent filed a personal injury action on behalf of Marjorie Keene arising out of an auto accident on July 10, 1989. In response to defendant's efforts to obtain the medical history of Ms. Keene, Respondent filed a motion for protective order essentially seeking to limit the disclosure of prior medical care unrelated to the injuries sustained in the accident.

The order of the trial court entered by Judge Ward on July 19, 1994, attempted to properly balance the interests of both parties while requiring the plaintiff to respond to the request for production, including in paragraph 4 the following language, "This Court admonishes all counsel to safeguard and not divulge or disclose without court order information pertaining to plaintiff relating to any emotion or mental condition and/or physical condition not related to the accident in question."

On November 21, 1994, Judge Ward entered an order compelling Respondent to provide answers or better answers to interrogatories and to produce documents earlier requested by the defendant in an effort to avoid the possible consequences of producing certain medical records which it produced.

Objecting to that limited disclosure pursuant to Judge Ward's order of July 1994, Respondent filed a petition for certiorari to the Second DCA on December 21, 1994, with the following caption: "Petition For Writ of Certiorari and Request to Review the 11/21/94 Order of Hillsborough County Circuit Judge Compelling

Production of Psychotherapist Records Detailing Abuse As a Child, the Present Claim for Low Back and Related Injuries."

On December 21, 1994, as order of the Second DCA noted that Respondent's petition for certiorari had been filed without paying the $250.00 filing fee or tendering an affidavit of insolvency on a timely basis and advised Respondent the case would be dismissed if neither were received within twenty (20) days of the order.

When Respondent sought further extension of time allowed under the order of December 21, 1994, an order to show cause was filed requiring Respondent to appear before the Court on January 31, 1995, to show cause why sanctions should not be imposed for repeatedly filing appeals without paying the filing fees or insolvency affidavits.

On January 25, 1995, Respondent filed an affidavit by Marjorie Keene in support of her motion for insolvency. In a written opinion entered on May 19, 1995, the Second DCA dismissed the petition for certiorari finding that the affidavit of Marjorie Keene was insufficient inasmuch as it contained no formal oath nor did it employ the standard language of an affidavit. Rehearing was denied on June 12, 1995.

Significantly, Respondent's motion for rehearing of the opinion filed on May 19, 1995 was captioned as follows: "Appellant's Motion for Rehearing Their Opinion Filed 5/19/95, Grounds For Such Rehearing Being Florida Statute 90.5035, Sexual Assault, Counselor/Victim Privilege, FRAP 9.100(B) Original Proceedings, Subsection B, Addressing Filing Fees."

On August 25, 1995, Respondent filed a further appeal from the Florida Supreme Court which declined to accept jurisdiction and dismissed the appeal on November 9, 1995. On February 2, 1996, the Florida Supreme Court denied Respondent's motion for reinstatement of the appeal.

Respondent properly attempted to restrict the disclosure of possible irrelevant medical information when he filed the motion for protective order. Judge Ward recognized the importance of such an effort and fashioned an order entered on July 19, 1994, clearly limiting the disclosure of such information by counsel.

Inasmuch as Respondent had taken such pains to restrict disclosure of child abuse at the trial level, what is clearly inexplicable is the explicit language used by Respondent in filing the petition for certiorari on November 21, 1994, and unnecessarily drawing attention to the child abuse history by including a reference to child abuse in the caption of the petition.

Moreover, in Respondent's subsequent motion for rehearing of an opinion filed 5/19/95, rehearing of the opinion filed 5/19/95, once again Respondent unnecessarily used explicit language in the caption referring to the sexual assault counselor/victim privilege. It is clear that such practice by Respondent was prejudicial to the interest of his client Marjorie Keene and falls substantially short of the minimum standards for representation of a client and that it violates The Florida Bar's rule on competence, 4-1.1.

Supreme Court Case No. 88,762
TFB No. 96-10,630 (6E)
Elisa Fernandes v. Donna Boisvert

Respondent represented Elisa Fernandes in a personal injury action he filed on her behalf. The facts of the personal injury action arose out of an incident occurring January 25, 1989 in Pinellas County wherein Respondent's client was allegedly brutally beaten by her former boyfriend on the property allegedly owned by several defendants in the lawsuit who not only allegedly know of the former boyfriend's state of mind and propensity for violence but also observed the beating during a thirty (30) minute time frame and allegedly failed to take any action to stop the beating or to contact the proper authorities by dialing 911.

For these reasons, the property owners were charged with negligence and alleged to be responsible for medical bills at Tampa General and permanent injuries. The allegation of incompetence and lack of diligence essentially rise out of three categories: one, filing the suite in Hillsborough County; two, Mr. Solomon's actions in dealing with the defendant's Motion for Summary Judgment; and, three, his failure to amend the initial complaint to allege more specific special damages.

With respect to the venue issue, Respondent testified that he took the case when no other attorney would do so. He only had a few hours to prepare and file the complaint on the last day prior to the running out of the statute of limitations and of necessity spent most of the time checking the property title records to make sure he was including in the lawsuit all the necessary property owners.

Respondent testified that he intentionally filed the suit in Hillsborough County for his own convenience even though he was aware that Pinellas County was the proper venue. Apparently he was unaware of the possibility that if the suit were dismissed for improper venue the case might well be subject to dismissal with prejudice. Accordingly, the referee finds that the intentional filing of the lawsuit on the last day in a clearly inappropriate venue substantially jeopardized the interests of the client, notwithstanding the fact that opposing counsel agreed later to a transfer of the case to Pinellas County. Such practice by Mr. Solomon is sufficient to constitute a lack of competence as required under Rule 4-1.1.

With respect to Mr. Solomon's handling of the defendant's Motion for Summary Judgment, based upon the Court's taking judicial notice of the court file, the sequence of defendant's pleadings reflect that on or about March 3, 1993, one of the defendants, Donna Boisvert, now known as Donna Leven, who apparently was the only party served, made an appearance, and filed an answer denying the claim and asserting four (4) affirmative defenses and also filed a motion to transfer for improper venue.

On April 23, 1993, the same defendant filed a Motion to Dismiss for failure to state a cause of action and scheduled a hearing on the Motion to Dismiss for June 2, 1993. On April 30, 1993, the defendant, Donna Boisvert, now known as Donna Leven, served a Motion for Summary Judgment with an attached affidavit, in proper form executed by Ms. Boisvert, asserting she had no knowledge of Todd Leven's emotional condition and was not aware of the incident until after it occurred.

The hearing on the defendant's Motion for Summary Judgment was scheduled for June 2, 1993 and notice of the hearing on the Motion for Summary Judgment was served upon plaintiff's counsel on April 30, 1993. In response to the Motion for Summary Judgment, Respondent, on May 28, 1993, filed an ambiguous writing entitled "Notice of Filing" to which he attached, one, an affidavit of a so called security consultant relating to the duty and care of a landowner and, two, a two-paragraph statement handwritten by Elisa Fernandes which was attached to a piece of paper and related solely to Fernandes' residence on the date of the incident. It bore the seal and signature of the notary but clearly did not meet the standards required for an affidavit.

In his testimony before the referee on December 4, 1996, on page 163, Mr. Solomon explained the reason that the initial two-paragraph writing bearing Elisa Fernandes' signature, served on May 28, 1996, dealt with Ms. Fernandes' residency. Mr. Solomon explained that he had spoken to the attorney for the defendant, Ms. Welsh on the phone on or about April 13, 1993, who informed him that the only issue she was intending to deal with at a future summary judgment hearing was that of Ms. Fernandes' residency and for that reason Mr. Solomon chose to limit Ms. Fernandes' two-paragraph writing to the residency issue.

Since he filed Ms. Fernandes' two-paragraph writing as to residence, which was dated April 17, 1996, only four (4) days after Mr. Solomon's conversation with Attorney Welsh on April 13, 1996, it would appear that Mr. Solomon had a reasonably quick method of making contact with Ms. Fernandes. It becomes of sub-

stantial importance when one notes that the defendant's actual Motion for Summary Judgment was served upon Mr. Solomon on April 30, 1993, and asserted four (4) separate bases for the Court awarding summary judgment rather than just the residency issue.

Consequently, it would appear that Mr. Solomon had nearly a full month, from about May 1, 1993 through May 30, 1993, to make further contact with Ms. Fernandes and discuss the proper manner of dealing with the defendant's more extensive Motion for Summary and to prepare a legally proper affidavit with a timely submission to defendant's counsel prior to the summary judgment hearing presumably held on June 2, 1993.

According to Mr. Solomon's testimony, he was indeed frantically attempting to reach Ms. Fernandes during the month of May without success in order to prepare a cured four (4) paragraph affidavit for her signature. She finally called him on June 1, 1993 and she physically appeared at the summary judgment hearing on June 2, 1993. At that time, Mr. Solomon testified that he asked for a continuance of the summary judgment hearing for the purpose of filing a cured affidavit. The record is unclear as to whether the defendant's attorney, Ms. Welsh, objected at that time or not or whether Judge Bonanno ruled on such a request.

In any event, a cured and properly filed affidavit executed by Ms. Fernandes was apparently filed on that date, June 2, 1993, which Judge Bonanno found to be either untimely filed or legally insufficient to raise a material issue of fact. Subsequently, the Second DCA set aside the summary judgment in favor of plaintiff through the substantial efforts of Mr. Solomon. The fact that the committed error in entering the summary judgment is not dispositive however, on the issue of whether Mr. Solomon was in violation of the Bar standards for competency. In its opinion, the DCA noted that the plaintiff's pleadings were in disarray and clearly contributed to the confusion surrounding the entry of the summary judgment at the outset. The fact that the Appellate Court was willing to pluck the plaintiff's chestnuts out of the fire, so to speak, does

not signify that Mr. Solomon had acted competently during the summary judgment proceedings.

Given the totality of the circumstances, the referee finds that Mr. Solomon's actions contributed substantially to the delay and consequent harm in timely litigating his client's case and finds that such action fails to meet the standards for competency under Rule 4-1.1.

Finally, it is urged that the failure of Mr. Solomon to amend the complaint to properly allege special damages placed Ms. Fernandes in jeopardy at the time of trial. Whereas substantial discovery may have been completed and defendant's counsel may not have raised the issue as to the sufficiency of the claim to date, this does not indicate that defendant's counsel would acquiesce to a verdict form as to special damages at the time of trial.

Mr. Solomon stated his rationale for not moving to amend the initial complaint was based upon his strategy in avoiding an opportunity for the defendant to amend its affirmative defenses. A review of the court file however reflects that the defendant has already moved to amend its affirmative defenses and a hearing on such motion is pending.

In view of the specific footnote one, added to the Second DCA's opinion authored by Judge Patterson, clearly suggesting the need for an amended complaint containing an allegation of special damages, the failure to seek an amendment to the initial complaint so as to add special damages reflects a lack of requisite skill required under Rule 4-1.1 dealing with legal competency.

III. Recommendations as to Whether or Not the Respondent should Be Found Guilty: As to each count of the complaints, I make the following recommendations as to guilt or innocence:

Supreme Court Case No. 86,914

COUNT I
TFB No. 94-11,299 (6E)
(Complaint of John N. Jenkins Poole v. C.F. Industries)

I recommend that Respondent be found not guilty of violating Rules 4-1.1 (competence) and 4-1.3 (diligence).

COUNT II
TFB No. 95-10,269 (6E)
Complaint of The Florida Bar - Polk v. Plaintiffs and State of Florida Department of Transportation

I recommend that Respondent be found not guilty of violating Rules 4-1.1 (competence) and 4-1.3 (diligence).

COUNT III
TFB No. 95-10,617 (6E)
Complaint of The Florida Bar - Breen v. Huntley-Jiffy Stores

I recommend that Respondent be found guilty of violating Rules 4-1.1 (competence) and 4-1.3 (diligence).

COUNT IV
TFB No. 95-10,618 (6E)
(Complaint of The Florida Bar - Keene v. Burdines)

I recommend that Respondent be found not guilty of violating Rules 4-1.1 (competence) and 4-1.3 (diligence).

COUNT V
TFB NO. 95-10,619 (6E)
Complaint of The Florida Bar - Hurst v. Yamaha)

I recommend that Respondent be found not guilty of violating Rules 4-1.1 (competence) and 4-1.3 (diligence).

COUNT VI
TFB NO. 95-10,621 (6E)
Complaint of The Florida Bar - Finley v. Villanti

I recommend that Respondent be found not guilty of violating Rules 4-1.1 (competence) and 4-1.3 (diligence).

Supreme Court Case No. 87,667
TFB NO. 95-11,780 (6E)
Keene v. Nudera

I recommend that Respondent be found guilty of violating Rule 4-1.1 (competence) and not guilty of violating Rule 4-1.3 (diligence).

Supreme Court Case No. 88,762
TFB NO. 96-10,630 (6E)
Elisa Fernandes v. Donna Boisvert

I recommend that Respondent be found guilty of violating Rule 4-1.1 (competence).

* * * * *

APPENDIX C.

Supreme Court of Florida

THURSDAY, JUNE 11, 1998

THE FLORIDA BAR,	*	
	*	
Complainant,	*	
	*	
v.	*	CASE NOS. 86,914,
	*	87,667, 88,762
DAVID LAWRENCE SOLOMON,	*	
	*	
Respondent.	*	
	*	

* *

Respondent's Motion for Rehearing, Amended Motion for Rehearing, Second Amended Motion for Rehearing, and Motion for Re-Trial of Case Number 88,762 Based Upon Misconduct of Florida Bar are hereby denied.

KOGAN, C.J., OVERTON, SHAW, HARDING, WELLS and ANSTEAD, JJ., and GRIMES, Senior Justice, concur.

A True Copy

TEST:

/s/
Sid J. White
Clerk, Supreme Court

cc: Mr. Joseph A. Corsmeier
Mr. John A. Boggs
Mr. Donald A. Smith, Jr.
Mr. Richard Greenberg
Mr. David L. Solomon

APPENDIX D.

Attorneys—Discipline—Failure to provide competent representation—Failure to act with reasonable diligence and promptness—Attorney was properly and adequately notified of nature and extent of charges against him, and referee did not consider conduct outside scope of accusations—Suspension—Probation

THE FLORIDA BAR, Complainant v. DAVID LAWRENCE SOLOMON, Respondent, Supreme Court of Florida Case Nos. 86,914, 87,667, 88762.

APPENDIX E.

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant, CASE NOS.: 86,914
vs. 87,667

DAVID LAWRENCE SOLOMON,

Respondent.
_____/

RESPONDENT'S MOTION FOR REHEARING

COMES NOW Respondent, DAVID LAWRENCE SOLOMON, by and through his undersigned counsel, and moves this Referee for a rehearing in the above styled cases, pursuant to Rule 1.530 Fla. R. Civ. P., as to the Referee's Findings of Fact, Recommendations of Guilt and Recommendation of Discipline and states the following:

1. On October 22, 1996 and on December 9, 1996, the Referee orally pronounced his Findings of Fact and Recommendations of Guilt as to the above referenced cases.

2. On December 13, 1996, the Referee orally pronounced his Recommendation of Discipline as to both above referenced cases which had been consolidated.

3. Florida Rule of Civil Procedure 1.530 provides for a party to move for rehearing on all or a part of the issues no later than ten (10) days after the date of filing of the judgment in a non-jury action. The rule further provides that a timely motion may be amended to state new grounds in the discretion of the Court at anytime before the motion is determined.

4. As of this date a Report of Referee has not been entered. However, unique and unusual circumstances exist in this case which require the filing of Respondent's Motion for Rehearing

prior to entry of the Report of Referee. More specifically, the Referee, Judge Don Castor, will retire from the County Court bench and will no longer serve as referee in this case after January 6, 1997. Accordingly, a limited time exists for the filing of this motion and for a rehearing, absent a special appointment of Judge Castor as referee after January 6, 1997.

5. The grounds for a rehearing include, but are not limited to, the following.

A. The findings of fact are not supported by competent, clear and convincing evidence and are contrary to the evidence;

B. The recommendations of guilt are necessarily dependent upon findings of fact and issues of law which were not raised by the pleadings in this case prior to trial and as a result, Respondent was surprised;

C. The recommendations of guilt are contrary to the law;

D. The recommendation of discipline is inconsistent with the facts and the recommendations of guilt is excessive and is inconsistent with the purposes to be served by discipline;

E. The recommendation of discipline serves to punish Respondent, does not promote rehabilitation and is unjust to Respondent, the bar and the public.

WHEREFORE, Respondent respectfully requests this Court to rehear this matter as it relates to the findings of fact, recommendations of guilt and recommendation of discipline, and to receive additional testimony and evidence as it relates to appropriate discipline.

Respectfully submitted,

/s/

DONALD A. SMITH, JR., ESQUIRE
SMITH AND TOZIAN, P.A.
109 North Brush Street
Suite 150
Tampa, Florida 33602
(813) 273-0063
Fla. Bar No. 265101

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail this 24th day of December, 1996, to: Joseph A. Corsmeier, Esquire, Assistant Staff Counsel, The Florida Bar, Tampa Airport, Marriott Hotel, Suite C-49, Tampa, Florida 33607 and Richard A. Greenberg, Esquire, 300 West Park Avenue, Tallahassee, Florida 32302.

/s/
DONALD A. SMITH, JR., ESQUIRE

APPENDIX F.

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,	CONSOLIDATED
Complainant,	CASE NUMBERS:
vs.	86,914
DAVID LAWRENCE SOLOMON,	87,667
Respondent.	88,762

_____/

On a Petition for Review of Referee Donald F. Castor, from the County Court of the 13th Judicial Circuit in and for Hillsborough County, Florida.

AMENDED INITIAL BRIEF OF APPELLANT

Respectfully submitted by: /s/_____

David Solomon, Esquire
FBN 368466
880 Mandalay Avenue
Suite #N-911
Clearwater, Florida 33767-1229
(813)442-8600

Co-Counsel for Respondent.

TABLE OF CONTENTS

STATEMENT OF THE CASE AND OF THE FACTS 1

SUMMARY OF THE ARGUMENT 13

ARGUMENT WITH REGARD TO EACH ISSUE:

Constitutional Issue: Whether the Referee deprived the Respondent of his Fifth and Fourteenth Amendment liberty interests that are guaranteed by the U.S. Supreme Court case of Board of Regents of State Colleges v. Roth, 92 S.Ct. 2701(1972) by finding the Respondent guilty of violations #1-#4 that were not charged in any of the paragraphs of the complaints? 14

Procedural Issue: Whether the Referee erred, as a matter of law, in finding the Respondent guilty of violation #2 and violation #4 after the Referee sustained objections and had striken from the record all testimony referring to sexual assault (1-324-332) (Tab #10) (violation #2), and all testimony referring to the Respondent's opposing the motion for summary judgment, (1-11-22) (Tab #5) (violation #4) 20

Substantive Issues:

Violation #5: Whether alleging "medical care at Tampa General Hospital" and "permanent injuries" sufficiently alleges special damages as a matter of law? 24

Violation #4: Whether prevailing on appeal can support a finding of incompetence? 25

Violation #3: Whether filing a complaint in other than the three (3) statutory alternatives can ever subject a complaint to dismissal with prejudice? 33

Violation #2: Whether using the "explicit language" of the official title to a statute is incompetent? 34

Violation #1: Whether a Rule9.130(f) interlocutory appeal stays a proceeding? 38

Discipline to be Imposed 39

Costs 44

Conclusion 44

Certificate of Service 45

APPENDIX G.

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,	)	
	)	
Complainant,	)	SC CASE NO. 88,762
	)	
vs.	)	TFB CASE NO. 96-10,630(6E)
	)	
DAVID LAWRENCE SOLOMON,	)	
	)	
Respondent.	)	

December 4, 1996
Tampa
Florida

TRANSCRIPT OF THE TRIAL BEFORE THE
HONORABLE DONALD P. CASTOR
COUNTY COURT JUDGE

APPEARANCES:

For the Complainant: Joseph A. Corsmeier, Esquire
Tampa Airport Marriott Hotel
Suite # C-49
Tampa, FL 33607

For the Respondent: Donald A. Smith, Jr., Esquire
109 North Brush Street
Suite # 150
Tampa, FL 33602

* * * * *

MR. CORSMEIER: In my closing argument, Judge, I plan on addressing the issues that I'm going to ask Judge Patterson about as they relate to the Rules of Civil Procedure and whether a competent practitioner would have followed certain procedures under the rules.

It could be argument. I would like to address those issues with Judge Patterson. I'm not going to be that long on those issues.

THE REFEREE: All right, Mr. Smith, anything further?

MR. SMITH: Only that what counsel intends to argue and the length of his cross-examination of judge Patterson are certainly not dispositive of the issue. Either it's relevant or it's not relevant. Our position is it is not relevant to this matter.

MR. CORSMEIER: This is direct, Judge.

THE REFEREE: Well, it's difficult for the Court to understand what the benefit to the Referee would be with a further line of inquiry of this nature.

MR. CORSMEIER: Okay, Judge.

THE REFEREE: But if you wish to briefly inquire, we'll let you do so and then we'll further review the relevance.

At this point in time, respectfully, I'll overrule the objection and give you some further leeway to inquire of Judge Patterson.

MR. CORSMEIER: Thank you, Judge.

THE REFEREE: With the understanding that if we go much beyond the appropriate line of inquiry, why Mr. Smith may wish to further object.

MR. CORSMEIER: Thank you, Judge.

BY MR. CORSMEIER:

Q. Judge Patterson, do the civil rules allow a mechanism for an attorney to indicate to the Trial Court that they cannot locate their client or that they cannot properly file an affidavit to defend the summary judgment motion?

MR. SMITH: Excuse me. Objection, Judge. That would be irrelevant to any of the matters set forth in the complaint. I renew my objection.

THE REFEREE: Well, it's a fairly generic line of inquiry, Mr. Corsmeier. I'm inclined to sustain the objection at this point.

MR. CORSMEIER: Thank you, Judge.

* * * * *

Q. Judge, if Mr. Solomon had filed an affidavit – or included a document in the Trial Court prior to the motion for Summary Judgment indicating that he could not locate his client or that he could not properly file an affidavit in opposition, would the Trial Court have had discretion and at that point would it have been an abuse of discretion not to grant a continuance?

MR. SMITH: Objection. Two objections. One is the leading question and second is the relevance of this question.

I believe this reverts back to a question that the Court previously sustained my objection to.

THE REFEREE: Mr. Corsmeier?

MR. CORSMEIER: Well, just because it calls for a yes-or-no answer doesn't mean it's leading. I didn't say, "Isn't it correct that it would be an abuse of discretion?" I asked for a yes-or-no answer. So, number one, it's not leading.

In answer to number two, I think Judge Patterson is entitled to give his opinion and tell you, as a Referee, his opinion on what the effect would be on an Appellate Court if Mr. Solomon had followed the Rules of Civil Procedure properly under 1.510(g). That's the Bar's position.

MR. SMITH: And I believe that rebuttal is unresponsive to the issue of relevancy. My position is it's nothing that was pled.

THE REFEREE: We'll sustain the objection.

I understand your position, Mr. Corsmeier. I think perhaps this line of inquiry is not really that useful to the Court. And I think the relevance of this line of inquiry remains somewhat questionable. So I'll sustain the objection.

MR. CORSMEIER: Thank you.

APPENDIX H.

Dec. 21, 96'

Hope everything is working out for you in regards to your case. I'm sorry that you have had to be put under pressure in this way. In my opinion it's a senseless travesty of justice to endure such persecution and contradiction as you have had to, for one so kind & diligent in his work. If it is of any consolation & in a way of speaking regardless if you cross all the t's, and dot all the i's. I believe you to be a good attorney not just for your legal educational background, but primarily because of the compassion you have exemplified to myself/my case & I'm sure to your other clients as well.

I only wish that I could have helped you more.

You might consider a visit to the mountains. Danielle & I have not only found them to be beautiful, but wonderfully peaceful as well. Let me know if I may be of any further help to you.

/s/ _
Ms. Elisa O'Hara